* Together with Case No. 472, Helvering v. Gambrill and Case No. 474, Helvering v. Knox and Case No. 475, Helvering v. Rogers.

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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 472

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

RICHARD VAN NEST GAMBRILL

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 28, 1940
CERTIORARI GRANTED NOVEMBER 12, 1940

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INDEX

	Original	Print
Proceedings before United States Board of Tax Appeals	1	1
Docket entries	1	1
Petition	3	2
Exhibit A—Notice of Deficiency dated June 18, 1935, sent to Richard Van Nest Gambrill by the office of the Commissioner of Internal Revenue	10	5
Answer	17	8
Findings of fact and opinion, Van Fossan, M	18	9
Decision	32	17
Petition for review and assignments of error	33	18
Notices of filing petition for review	41	22
Stipulation of facts	43	24
Praecipe for record	50	28
Certificate of clerk [omitted in printing]	52	29
Proceedings in U. S. C. C. A., Second Circuit	53	29
Opinion, Hand, J	53	30
Judgment	63	35
Clerk's certificate [omitted in printing]	65	36
Qrder allowing certiorari	66	36

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1 Before United States Board of Tax Appeals

Docket No. 81544

RICHARD VAN NEST GAMBRILL, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT,

Docket entries

Appearances: For Taxpayer—Sidney W. Davidson, Esq.; Ben R. Clark, Esq., Allin H. Pierce, Esq. For Comm'r—W. Frank Gibbs, Esq.

1935

Sept. 14—Petition received and filed. Taxpayer notified (Fee paid)
Sept. 14—Copy of petition served on General Counsel.
Oct. 11—Answer filed by General Counsel.
Oct. 16—Copy of answer served on taxpayer.

1937

Sept. 9—Hearing set 12/9/37.
Oct. 30—Motion to place on Circuit Calendar for hearing in New York City filed by taxpayer. 11/1/37 granted.

2 1938

Feb. 26—Hearing set April 25, 1938, at New York City.
May 4—Hearing had before Mr. Van Fossan, Div. 9 on merits. Submitted. Stipulation of facts filed. Entry of appearance of A. H. Pierce filed. No brief for petitioner. Respondent's brief due June 1, 1938—petitioner's reply due June 16, 1938.
May 16—Transcript of hearing of May 4, 1938, filed.
May 28—Brief filed by General Counsel.
Jun. 16—Reply brief filed by taxpayer. 6/16/38 copy served.
Oct. 21—Findings of fact and opinion rendered, Ernest H. Van Fossan, Div. 9. Decision will be entered under Rule 50.
Nov. 14—Computation of deficiency filed by General Counsel.
Nov. 18—Hearing set Nov. 30, 1938, on settlement.
Nov. 23—Consent to settlement filed by taxpayer.
Nov. 30—Decision entered, Ernest H. Van Fossan, Div. 9.

1939

Feb. 8—Petition for review by U. S. Circuit Court of Appeals (2) with assignments of error filed by General Counsel.

Feb. 14—Proof of service filed by General Counsel.

Mar. 1—Praecipe for record filed by General Counsel with proof of service thereon.

Mar. 14—Proof of service filed by General Counsel.

3 Before United States Board of Tax Appeals

Docket No. 81544

[Same title.]

Petition

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency IT:AR:A-2:MEK-90D, dated June 18, 1935, and as a basis of his proceeding alleges as follows:

1. The petitioner is an individual with his residence at Peapack, New Jersey.

2. The Notice of Deficiency, a copy of which is attached and marked Exhibit A, was mailed to the petitioner on June 18, 1935.

3. The taxes in controversy are income taxes for the calendar year 1930 and in the amount of $11,753.40.

4. The determination of tax set forth in said Notice of Deficiency is based upon the following errors:

(a) The Commissioner of Internal Revenue has erred in holding that the basis for determining gain or loss from the sale or other disposition of certain securities received by the petitioner as remainderman, after the death of the life beneficiary, of a trust created under the last will and testament of Mary Van Nest is the cost to the trustees of the securities purchased
4 by them after March 1, 1913, or the fair market value as of March 1, 1913, of such securities as were acquired prior to that date.

(b) The Commissioner of Internal Revenue has erred in holding that in determining the period for which these securities had been held by the petitioner under the provisions of Section 101 of the Revenue Act of 1928, the date March 1, 1913, or the date on which the securities were purchased by the trustees, were acquired subsequent to that date, should control

5. The facts upon which the petitioner relies as a basis of this proceeding are as follows:

(a) Under the will of the petitioner's grandmother, Mary Van Nest, who died on November 20, 1897, a trust was created for the benefit of her daughter Anna Van Nest Gambrill, the will providing that the income of the trust should be paid to the said Anna Van Nest Gambrill for life and that upon her death the trustees were to "transfer and deliver the same as she, if leaving issue, shall by will direct, or, in the absence of such direction, to her issue equally." Anna Van Nest Gambrill died on March 23, 1928, without exercising the power of appointment conferred upon her by the will of Mary Van Nest and according to the terms of the said will of Mary Van Nest the trustees in due course transferred the corpus of the trust to the petitioner, who was the sole surviving issue of Anna Van Nest Gambrill.

(b) Upon the death of the life beneficiary on March
5 23, 1928, the trustees of the trust under the will of Mary Van Nest proceeded with the settlement of their accounts. One of the matters which had to be settled before the trustees could make distribution of the corpus to the remainderman was the question of further taxes due to the State of New York from the estate of Mary Van Nest for inheritance tax on the said remainder interest. In the original appraisal of the estate of Mary Van Nest, filed for the purpose of determining the New York State inheritance tax, the appraiser reported that the value of this remainder interest was not at that time ascertainable and the collection of the inheritance tax on this remainder interest was therefore held in abeyance under the provisions of Section 221, Chapter 908 of the Laws of 1896 of the State of New York. Under this section the tax on the said remainder interest would become due and payable when the person or persons beneficially entitled thereto should come into actual possession or enjoyment thereof. The tax was made a lien upon the property transferred and the law provided that no trustee should be entitled to a final accounting unless he should produce a receipt sealed and countersigned by the Comptroller of the State of New York, or a copy thereof certified by him, unless a bond should have been filed as prescribed by law. The trustees on or about April 16, 1928, by their attorney, filed a petition in the Surrogate's Court for the County of New York asking for an order modifying the original order fixing the New York State inheritance tax on the estate of Mary Van Nest and on or about May 1, 1928, such an order was entered assessing a tax of $2,359.91 upon the value of the remainder interest passing to the petitioner. This additional tax was paid on or about May 24, 1928.

6 (c) The trustees made other payments prior to distribution to the petitioner, which payments included fees to one of the trustees for legal services, commissions to the

trustees or receiving gain on the corpus of the trust and for paying out the corpus of the trust, payments to the executors of the estate of Anna Van Nest Gambrill for income collected after her death, fees for services in preparing Federal and state income tax returns and payments to the trustees for commissions on income. Further transactions had by the trustees after the death of the life tenant included the sale of $40,000. of New York City 4% bonds, the sale of which was necessary in order to raise funds for the payment of the trustees' commissions and for the payment of the New York State inheritance tax on the remainder interests passing to the petitioner.

(d) There was no judicial settlement of the accounts of the trustees, but the trustees accounted by receipt and release, the release being signed on May 22, 1928, by the petitioner individually, and by Lewis Cass Ledyard, Jr. and the petitioner as executors of the last will and testament of Anna Van Nest Gambrill. The balance of the corpus included in the trust was distributed to the petitioner on or about May 5, 1928.

(e) Certain of the securities included in the said remainder interest so distributed to the petitioner on May 5, 1928, were sold by him during the calendar year 1930. On his Federal income tax return filed on or before March 15, 1931, gain or loss
7 from the sale of these securities was determined by using as the basis for these securities their fair market value as of May 5, 1928. These sales resulted in a loss of $31,305.63 of which amount $5,188.44 was claimed as an ordinary current loss and the balance of $26,117.19 was claimed as a loss from the sale of capital assets as defined by Section 101 of the Revenue Act of 1928. In determining the period for which these securities had been held, the petitioner used the date May 5, 1928, and all of the securities which were sold subsequent to May 5, 1930, were treated as capital assets.

(f) The Commissioner of Internal Revenue in his Notice of Deficiency (Exhibit A) has recomputed the gain or loss from the sale of these securities and has used as a basis for the same the March 1, 1913, value of such securities as were included in the trust prior to March 1, 1913, and the cost of the trustees of such securities as were purchased subsequent to March 1, 1913. In determining the period for which the petitioner had held the securities, the Commissioner of Internal Revenue has used the date March 1, 1913, for securities included in the trust prior to that date and the dates of purchase by the trustees for the securities acquired subsequent to March 1, 1913.

Wherefore the petitioner prays that this Board may hear the proceeding and make a correct determination of his tax liability and grant relief from the deficiency asserted by the

respondent against him in the Notice of Deficiency (Exhibit A) in the following particulars:

(a) The petitioner prays that this Board may find that
8 in determining gain or loss realized from the sale of the securities received by him as remainderman of the trust under the will of Mary Van Nest the basis should be the fair market value of the said securities as of May 5, 1928.

(b) The petitioner prays that this Board may find that in determining the period for which the petitioner held the securities received by him as remainderman of the trust under the will of Mary Van Nest under the provisions of Section 101 of the Revenue Act of 1928, the petitioner held such securities from May 5, 1928, to the respective dates of sale.

(c) The petitioner prays that this Board may find that there is no deficiency due on the petitioner's Federal income tax return for the calendar year 1930, and that the proposed deficiency of $11,753.40 should be abated and set aside.

Dated September 11, 1935.

(S) SIDNEY W. DAVIDSON,
Sidney W. Davidson,
(S) BEN R. CLARK,
Ben R. Clark,
Counsel for Petitioner,
Office & Post Office Address, 2 Wall Street,
New York, New York.

9 [*Duly sworn to by Richard Van Nest Gambrill; jurat omitted in printing.*]

10 *Exhibit A annexed to petition*

Address reply to Commissioner of Internal Revenue.

OFFICE OF
COMMISSIONER OF INTERNAL REVENUE,
TREASURY DEPARTMENT,
Washington, June 18, 1935.

Mr. RICHARD VAN NEST GAMBRILL,
C/o Carter, Ledyard & Milburn,
2 Wall Street, New York, N. Y.

SIR: You are advised that the determination of your income tax liability for the year (x) 1930, discloses a deficiency of $11,753.40 as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1928, as amended by section 501 of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within

ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing and filing of this form will expedite the closing of your return (x) by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

11

Respectfully,

GUY T. HELVERING,
Commissioner.
By CHAS. T. RUSSELL,
Deputy Commissioner.

Enclosures:
Statement.
Form 870.

STATEMENT

IT:AR:A-2.
MEK-90D.

In re: Richard Van Nest Gambrill,
% Carter, Ledyard & Millburn,
2 Wall Street,
New York, New York

Income Tax Liability

Year 1930: Income tax liability, $36,289.04; income tax assessed, $24,535.64; deficiency, $11,753.40.

The deficiency as shown herein results from adjustments as shown in the report of Internal Revenue Agent C. A. Broach dated September 26, 1932, a copy of which was transmitted to you on November 18, 1932, and to such adjustments made as a result of the conferences held in this office on June 27, 1934, November 7, 1934, and May 13, 1935.

12

In determining gain or loss on the sale of securities received by you as remainderman of a trust created under the will of Mary Van Nest who died on November 20, 1897, there is used

the same basis as in the hands of the trustee that is the cost of the securities to the trustee or the March 1, 1913 value of such securities as were acquired prior to March 1, 1913, inasmuch as the actual cost is unknown.

In accordance with G. C. M. 14893, Internal Revenue Bulletin Volume XIV, No. 21, where a testator who died in 1910 directed that his estate be held in trust for a period of ten years after his death and at the end of that period be distributed to certain beneficiaries, securities forming a part of the estate were "acquired" by the beneficiaries at the date of death of the testator. The basis of the securities transferred to the beneficiaries in 1920 is the value of the securities at the date of distribution to the trustee by the executor of the estate or the March 1, 1913 value, whichever is greater.

Inasmuch as the taxpayer was in being at the time of his grandmother's death on November 20, 1897, it would appear that the taxpayer's interest in the trust corpus was "acquired" at the time of the formation of the trust. Accordingly, the proper basis in the instant case under section 113 (b) of the Revenue Act of 1928, is the value at the date of distribution to the trustee or the March 1, 1913 value.

Net income is adjusted as follows:

13	Ordinary net income on which deficiency of $3,911.56 was based		$101,161.66
	Add: Loss on sale of securities received from the Mary Van Nest Trust eliminated		5,550.57
	Ordinary net income revised		$106,712.23
	Capital net gain included in previous adjustment		$101,391.43
	Add:		
	Capital net gain on sale of securities received from the Mary Van Nest Trust	$60,053.32	
	Capital net loss previous adjustment	25,092.94	85,146.26
	Capital net gain revised		$186,537.69
	Income subject to surtax		$106,712.23
	Less:		
	Dividends	$175,632.40	
	Interest on Liberty Bonds	271.20	
	Personal exemption and credit for dependents	800.00	176,703.60
	Balance subject to normal tax		None
14	Surtax on $106,712.23		$13,002.45
	Tax at 12½% on capital net gain of $188,537.69		23,317.21
	Total tax		$36,319.66
	Tax paid at source		30.62
	Tax liability		$36,289.04
	Tax previously assessed		24,535.64
	Deficiency		11,753.40

Profit on sale of securities from the Mary Van Nest Trust is determined as follows:

Acquired by trustee	Value reported	March 1, 1913 value or cost to trustee	S. P.
2 AA Third Ave. R. R. 4/60, March 12, 1912	$1,440.00	$1,717.50	$1,015.00
54 U. S. Steel pfd., Sept. 9, 1921	7,830.00	5,889.93	7,925.34
122 Manhattan Ry., Prior to March 1, 1913	7,160.75	15,982.00	4,544.62
15 50 Rerisselaer & Saratoga R. R., Prior to March 1, 1913	7,275.00	9,025.00	6,898.00
100 Pittsburgh, Ft. Wayne & Chic. Ry., Prior to March 1, 1913	16,400.00	16,200.00	15,096.00
10 Chic. & E. Ill. Ry. Pfd., Prior to March 1, 1913	762.50	516.14	400.85
405 Glen Alden Coal, Aug. 16, 1921	66,369.38	2,025.00	40,380.30
405 Lackawanna Sec., Sept. 16, 1927	20,067.35	9,846.46	16,616.80
200 Nat'l. City Bank, Prior to March 1, 1913	35,700.00	10,344.00	39,022.44
	$163,004.98	$71,546.03	$131,590.35

Selling price	$131,599.35
Cost or March 1, 1913, value	71,546.03
Profit (Capital net gain)	$60,053.32

Explanation of Changes

In determining the gain or loss based on the value as of May 5, 1928, the date of distribution, an ordinary loss of $5,550.57 and capital net loss of $25,092.94 were determined.

16 Computation of gain or loss based on the cost of the securities to the trustees or March 1, 1913, value, results in a profit of $60,053.32, therefore, the ordinary loss of $5,550.57 is eliminated.

A copy of this letter, together with a copy of the statement and schedules has been mailed to your representative Mr. Ben R. Clark, c/o Carter Ledyard & Milburn, 2 Wall Street, New York, New York, in accordance with the authority conferred upon him in the power of attorney executed by you and on file with the Bureau.

17 Before United States Board of Tax Appeals

Docket No. 81544

[Same title.]

Answer

The Commissioner of Internal Revenue by his attorney, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revnue, in answer to the petition of the above-named taxpayer, admits and denies as follows:

1, 2, 3. Admits the allegations contained in paragraphs 1, 2, and 3 of the petition.

4. (a), (b). Denies that the Commissioner erred in respect of the matters set forth in subparagraphs (a) and (b) of paragraph 4 of the petition.

5. (a), (b), (c), (d), (e), (f). Denies the allegations contained in subparagraphs (a), (b), (c), (d), (e), and (f) of paragraph 5 of the petition.

6. Denies each and every material allegation of fact contained in the petition not hereinbefore specificially admitted, qualified, or denied.

Wherefore, it is prayed that the taxpayer's appeal be denied.

(Signed) ROBERT H. JACKSON,
Robert H. Jackson,
Assistant General Counsel
for the Bureau of Internal Revenue.

Of Counsel:
WILLIAM E. DAVIS,
STANLEY B. ANDERSON,
Special Attorneys,
Bureau of Internal Revenue.

SBA–eds–10–10–35.

18 Before United States Board of Tax Appeals

Docket No. 81544. Promulgated October 21, 1938

[Same title.]

1. Held, that under section 113 (a) (5) of the Revenue Act of 1928 the basis for determining gain or loss from the sale of securities acquired by a remainderman after the death of the life beneficiary of a testamentary trust is the fair market value of the property when distributed to the taxpayer at the termination of the trust.

2. Held, under the capital gains provisions of section 101 of the Revenue Act of 1928, that the securities in question were not "held by the taxpayer," petitioner remainderman, from the date of the death of the original grantor.

Ben R. Clark, Esq., and Allin H. Pierce, Esq., for the petitioner. W. Frank Gibbs, Esq., for the respondent.

Findings of fact and opinion

This proceeding was brought for a redetermination of a deficiency of $11,753.40 in petitioner's income tax for the calendar year 1930.

The questions presented are (1) the date to be used in fixing the basic valuation of securities which petitioner had received as remainderman of a testamentary trust after the death of
19 the life beneficiary for the purpose of determining taxable gain or loss to petitioner on the sale thereof; and (2) the date to be used for the purpose of determining the period for which these securities were held by petitioner prior to their sale within the meaning of the capital net gains and losses provisions of the applicable statute.[1]

Findings of fact

The facts were stipulated substantially as follows:

Mary Van Nest died a resident of the County of New York, State of New York, on November 20, 1897, leaving a last will and testament which was duly admitted to probate by the Surrogate of the County of New York, letters testamentary being issued to Franklin W. Gilley, Giraud Foster, and Thomas Thacher as executors.

The ninth article of this will reads in part as follows:

"NINTH. All the residue of my estate of every kind I give and devise as follows:

'One half thereof in equal shares to my daughters Mary Van Nest Jackson, Anna Van Nest Gambrill, and Jennie Van Nest Foster, and my granddaughter, Mary Alice Van Nest absolutely.

'The other half thereof in four equal shares to my executors, to hold the same in trust, one share for the benefit of each of the same four persons to wit my said three daughters and my said granddaughter and to receive the income and pay the same to her during her life with full power to invest and reinvest in
20 their discretion without any limitation whatsoever and at her death to transfer and deliver the same as she if leaving issue shall by will direct or in the absence of such direction, to her issue equally, or if she shall leave no issue, then to the survivors of the said four persons to wit my said three daughters and my said granddaughter, and to the issue of any of the said four persons who may have died, the issue to take the share which the parent would have taken if living. * * *'"

The executors proceeded with the administration of the estate, and on or about January 4, 1898, they delivered to themselves, as trustees for Anna Van Nest Gambrill, the following securities at the following prices:

375 shares Farmers Loan & Trust Co., par value $25	$76,406.25
300 shares Harlem Railroad Co	48,000.00
100 shares Pittsburgh & Fort Wayne Railroad	16,900.00

[1] Sec. 101, Revenue Act of 1928.

200 shares New York, N. H. & H. R. R.	$36,600.00
300 shares Delaware, Lackawanna & Western Railroad	23,250.00
50 shares Rensselaer & Saratoga Railroad	9,250.00
75 shares Chicago & North Western Railroad, preferred	12,225.00
Total	222,631.25

Separate trusts were likewise set up by the trustees for each of other three life beneficiaries named in the will of Mary Van Nest and securities of a value equal to the value of those set forth above in favor of Anna Van Nest Gambrill were delivered by the executors to themselves as trustees for Mary Van Nest Jackson, Jennie Van Nest Foster, and Mary Alice Van Nest.

21 Anna Van Nest Gambrill, mother of petitioner and the life beneficiary of one of the trusts, died on March 23, 1928, without having exercised the power of appointment conferred upon her by the ninth article of the will of Mary Van Nest. Her sole surviving issue was petitioner, Richard Van Nest Gambrill, who was born prior to the death of Mary Van Nest.

Upon the death of Anna Van Nest Gambrill, the trustees of the trust for her benefit under the will of Mary Van Nest proceeded with the settlement of their accounts. One of the matters which had to be settled before the trustees could make distribution of the corpus to the petitioner as remainderman was the question of additional inheritance taxes due to the State of New York from the estate of Mary Van Nest on the remainder interest. In the original appraisal of the estate of Mary Van Nest, filed for the purpose of determining the New York State inheritance tax, the appraiser reported that the value of this remainder interest was not at that time ascertainable, and the collection of the inheritance tax on this remainder interest was therefore held in abeyance under the provisions of section 221, chapter 908, Laws of 1896 of the State of New York. Under this section the tax on the remainder interest would become due and payable when the person or persons beneficially entitled thereto should come into actual possession or enjoyment thereof. The tax was made a lien upon the property transferred, and the law provided that no trustee should be entitled to a final accounting unless he should produce a receipt sealed and countersigned by the Comptroller of the State of New York, or a copy thereof certified by him, unless a bond should have been filed as prescribed by law. On or about the 16th day of April 1928, the

22 trustees by their attorney filed a petition in the Surrogate's Court for the County of New York, asking for an order modifying the original order fixing the New York State inheritance tax on the estate of Mary Van Nest, and on or about May 1, 1928, an order was entered assessing a tax of $2,359.91

upon the value of the remainder interest passing to the petitioner. This tax was paid on or about May 24, 1928.

Other payments made by the trustees prior to the transfer and delivery of the corpus to petitioner included fees for legal services, commissions to the trustees on receiving gain on the corpus of the trust and for paying out the corpus of the trust, payments to the executors of the estate of Anna Van Nest Gambrill for income collected after her death, fees for services in preparing Federal and state income tax returns, and payments to the trustees for commissions on income. Other transactions by the trustees after the death of the life tenant included the sale of $40,000 of New York City 4's of 1936, the sale of which was required in order to raise funds for the payment of the trustees' commissions and for the payment of the New York State inheritance tax on the remainder interests passing to the petitioner.

There was no judicial settlement of the accounts of the trustees, but the trustees accounted by receipt and release, the release being signed on May 22, 1928, by petitioner individually, and by Lewis Cass Ledyard, Jr., and petitioner as executors of the last will and testament of Anna Van Nest Gambrill. The balance of the corpus included in the trust as to which petitioner was remainderman was delivered to petitioner in accordance with the terms of the will of Mary Van Nest, on or about May 5, 1928.

During the calendar year 1930 petitioner sold certain of the securities which had been delivered to him by the trustees. In computing gain or loss from the sale of these securities, petitioner used their fair market value as of May 5, 1928.

23 These securities sold in 1930, together with the proceeds received therefor, the dates of sale, and the fair market value as of May 5, 1928, are as follows:

Securities	Date of sale—1930	Proceeds	May 5, 1928 value
$2,000 Third Avenue Railroad 4/60	Feb. 18	$1,015.00	$1,440.00
54 shares United States Steel preferred	Feb. 18	7,625.34	7,830.00
122 shares Manhattan Railway	Feb. 20	4,544.62	7,160.75
50 shares Rensselaer & Saratoga Railroad	Feb. 19	6,898.00	7,275.00
100 shares Pittsburgh, Fort Wayne & Chicago Railway	Feb. 20	15,096.00	16,400.00
10 shares Chicago & Eastern Illinois Railway preferred	Feb. 21	400.85	762.50
405 shares Glen Alden Coal	May 6	40,380.30	66,369.38
405 shares Lackawanna securities	June 4	16,616.80	20,067.35
200 shares National City Bank	June 9	39,022.44	35,700.00
Total		131,599.35	163,004.98

The March 1, 1913, fair market value of the securities acquired prior to that date, or the cost, whichever is greater, and the cost to the trustees of the securities acquired after March 1, 1913, are as follows:

24 Securities	Acquired by trustees	March 1, 1913 or cost to trustees
$2,000 Third Avenue Railroad 4/60	Mar. 12, 1912	$1,717.50
54 shares United States Steel preferred	Sept. 9, 1921	5,889.93
122 Shares Manhattan Railway	Prior to Mar. 1, 1913	15,982.00
50 shares Rensselaer & Saratoga Railroad	Prior to Mar. 1, 1913	9,025.00
100 shares Pittsburgh, Fort Wayne & Chicago Railway	Prior to Mar. 1, 1913	16,200.00
10 shares Chicago & Eastern Illinois Railway preferred	Prior to Mar. 1, 1913	516.14
405 shares Glen Alden Coal	Aug. 16, 1921	2,025.00
405 shares Lackawanna securities	Sept. 16, 1927	9,846.46
200 shares National City Bank	Prior to Mar. 1, 1913	10,344.00
Total		71,546.03

The fair market values of these securities as of March 23, 1928, the date of death of the life beneficiary, Anna Van Nest Gambrill, are as follows:

Securities	Adjusted value Mar. 23, 1928
$2,000 Third Avenue Railroad 4/60	$1,380.00
54 shares United States Steel, preferred	7,830.00
25 122 shares Manhattan Railway	5,154.50
50 shares Rensselaer & Saratoga Railroad	7,225.00
100 shares Pittsburgh, Fort Wayne & Chicago Railway	16,500.00
10 shares Chicago & Eastern Illinois Railway, preferred	700.00
405 shares Glen Alden Coal	62,471.25
405 shares Lackawanna securities	19,398.46
200 shares National City Bank	31,400.00
Total	152,059.21

In determining the period for which petitioner had held these securities, under the provisions of section 101 of the Revenue Act of 1928, petitioner used the date May 5, 1928, whereas respondent has determined that the period held should be computed from November 20, 1897, the date of the death of Mary Van Nest, in the case of securities owned by her at the time of her death, and from the dates of purchase in the case of securities subsequently purchased by the trustees.

Opinion

VAN FOSSAN. The first of two major questions presented by the case at bar is the date to be used for the purpose of fixing the basic valuation in determining the gain or loss to petitioner on the sale of securities which he received as remainderman of a testamentary trust after the death of the life beneficiary.

The second question is the date to be used in determining
26 the period for which these same securities were held by petitioner prior to their sale, within the meaning of the capital gains provisions of the applicable revenue act.[2]

[2] Sec. 101, Revenue Act of 1928.

The securities which petitioner received as remainderman, after the death of the life beneficiary, are capable of being divided into two categories, the first being those securities which had come to the trustees as part of the trust res, and the second being those securities which were purchased by the trustees with trust funds, subsequent to March 1, 1913, and held by them until delivery to petitioner in 1928.

The statutory provisions governing the basis for the determination of gain or loss are found in section 113 of the Revenue Act of 1928 and those here pertinent are as follows:

"(a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * * *

'(5) Property transmitted at death.—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was ac-
27 quired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons, entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death;'

* * * * * *

"(b) Property acquired before March 1, 1913.—The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, shall be:

'(1) the cost of such property (or, in the case of such property as is described in subsection (a) (1), (4), (5), or (12) of this section, the basis as therein provided), or

'(2) the fair market value of such property as of March 1, 1913,'

"whichever is greater. In determining the fair market value of stock in a corporation as of March 1, 1913, due regard shall be given to the fair market value of the assets of the corporation as of that date."

As to the first above indicated issue, respondent urges that petitioner's interest under the testamentary trust was a
28 vested interest under the controlling law of New York (as to the securities which were a part of the original trust res); that where property is bequeathed in trust, distribution by the executor of the donee's estate to the trustee constitutes the "distribution to the taxpayer" contemplated by the statute (as to the securities which were acquired by the trustees with trust funds); that where trustees purchase property with trust funds, and later distribute the property so acquired to the taxpayer, such property is not "acquired by will or intestacy" within the meaning of the above quoted statute.

Even though petitioner's interest under New York law may be a vested interest acquired at the date of testator's death, which was prior to March 1, 1913, and as such brings the matter within the purview of section 113 (b), that section, by its terms, makes section 113 (a) (5) controlling. The date of acquisition therefore is removed from the picture and the date for determining gain or loss is the date prescribed by section 113 (a) (5). Counsel are agreed that the applicable provision of the subsection is the provision covering "all other cases" and that the basis therefore is "the fair market value of the property at the time of the distribution to the taxpayer."

Respondent concedes that Ralph W. Harbison, 26 B. T. A. 896,[3] Mary Colgate, 27 B. T. A. 506,[4] Margaret E. B. Fleming, 36 B. T. A. 773, are all contrary to the position he takes on the first issue. These cases, together with Van Nostrand v. United States, 18 Fed. Supp. 295, affd., 94 Fed. (2d) 510,
29 hold that the phrase "time of distribution to the taxpayer" as used in the statute, means the time when this property was actually delivered to or made available for the use of the taxpayer.

However, respondent cites Jenkins v. Smith (U. S. Dist. Ct., Dist. Conn.), 21 Fed. Supp. 433, as squarely supporting his contentions, and urges that this Board reconsider the entire issue on the basis of the Jenkins case and the arguments presented in the brief in the case at bar.

After a careful consideration of respondent's arguments and with due deference to the District Court for the District of Connecticut, we are constrained to adhere to our original position. Nothing is presented which would justify our recantation. We, therefore, hold that the basis to petitioner for the purpose of determining gain or loss on the sale of the securities in question

[3] Reversed on another issue, 68 Fed. (2d) 1004; 293 U. S. 144.
[4] Reversed on another issue, mandate C. C. A., 2d Cir., on stipulation to abide by decision in Bliss v. Commissioner, 68 Fed. (2d) 890; 293 U. S. 144.

is the fair market value of such securities on May 5, 1928, the date when the corpus of the trust was delivered to petitioner. This was the time of the "distribution to the taxpayer." Cf. Robert A. Taft, Trustee, 34 B. T. A. 603; Bessie C. Williamson, 34 B. T. A. 924.

Respondent urges that the second issue, being concerned with the capital gains provisions of the statute, is not dependent upon the date used under section 113 for determining the basis for gain or loss and that the securities here involved have been held by petitioner, within the meaning of section 101 of the Revenue Act of 1928, since the respective dates on which they were acquired by the trust estate. In other words, that those securities which were a part of the original trust res were "held by the taxpayer" since the death of the testator, and those securities which were acquired by the trustee with trust funds were "held by the taxpayer" since the time of their purchase.

Respondent relies on McFeely v. Commissioner, 296 U. S. 102, which case directly severs any dependence of section 101 on section 113 for the determination of the holding period.

In addressing itself to the question presented in the McFeely case the Supreme Court, through Justice Roberts, declared that "held" and "acquired" were in effect synonymous, and stated:

"* * * In common understanding, to hold property is to own it. In order to own or hold, one must acquire. The date of acquisition is, then, that from which to compute the duration of ownership or length of holding. Whether under local law title to personal property passes from a decedent to the legatee or next of kin at death subject to a withholding of possession for purposes of administration, or passes to the personal representative for the purposes of administration—the title of the beneficiary, though derived through the executor, relating back to the date of death—is for the present purposes immaterial. In either case, the date of acquisition, within the intent of the Revenue Act is the date of death." [Citing Brewster v. Gage, 280 U. S. 327.]

To determine the application of the McFeely case to the case at bar, it is necessary to consider the particular questions involved in the two cases. The McFeely case, which is really a consolidation of five cases, is concerned with the administration period between the date of death of the original holder and the date of actual acquisition by the respective taxpayers, and involves, respectively, residuary legatees, the donee of a widow who elected to take against her husband's will, and one taking under intestate laws. The Court states the question "whether property acquired from a decedent through intestacy, or

31 a general bequest, is, within the meaning of the clause [held by the taxpayer for more than two years] held by the taxpayer from the date of decedent's death or from the date of distribution." The case at bar is concerned with the date of acquisition of a remainderman's interest in a trust estate after the death of the life beneficiary. This, we think, presents a distinctly different problem, one not ruled on in the cited case. For this reason we do not deem the McFeely case controlling here.

As above noted, respondent contends that the securities which were originally a part of the trust estate were "held by the taxpayer" from the date of the death of the original grantor (1897), and those purchased with trust funds were held from the date of such purpose. This contention was based on McFeely v. Commissioner, supra, which, as above indicated, we have rejected as controlling in the case at bar.

Petitioner urges that the controlling date is May 5, 1928, the date of delivery of the trust corpus to petitioner. Whether this date or that of March 23, 1928, the date of death of the life beneficiary, is the determinative date it is not necessary in this case to decide. The result is the same whichever be taken. The findings of fact establish that certain securities were sold prior to March 23, 1930, and that others were sold after May 5, 1930. None were sold in the interval between the two dates.

We hold that those securities sold in February 1930 had not been held by the taxpayer for more than two years and were, therefore, not capital assets, while those sold on May 6 and in June 1930 had been held by taxpayer for more than two years and were, therefore, capital assets.

Decision will be entered under Rule 50.

[SEAL]

32 Before United States Board of Tax Appeals,
Washington

Docket No. 81544

[Same title.]

Decision

Pursuant to the Findings of Fact and Opinion of the Board promulgated October 21, 1938, the respondent herein having on November 14, 1938, filed a recomputation and the petitioner having on November 23, 1938, filed an acquiescence therein, now therefore, it is ordered and decided: That there is an overpayment in income tax for the year 1930 in the amount of $75.60, which amount was paid within two years of the filing of the petition

in accordance with the provisions of Section 809 (c), Revenue Act of 1938.

[SEAL] (S) ERNEST H. VAN FOSSAN, *Member.*

Enter.

Entered November 30, 1938.

33 In United States Circuit Court of Appeals for the Second Circuit

B. T. A. Docket No. 81544

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER ON REVIEW

vs.

RICHARD VAN NEST GAMBRILL, RESPONDENT ON REVIEW

Petition for review and assignments of error

Now comes the Commissioner of Internal Revenue, by his attorneys, James W. Morris, Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and John M. Morawski, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I

JURISDICTION

The petitioner on review (hereinafter referred to as the Commissioner) is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States.

The respondent on review, Richard Van Nest Gambrill (hereinafter referred to as the taxpayer), is an individual
34 with his residence at Peapack, New Jersey. His individual income tax return for the year 1930 was filed with the Collector of Internal Revenue for the Second District of New York, whose office is located at New York, N. Y., and within the judicial circuit of the United States Circuit Court of Appeals for the Second Circuit.

The Commissioner files this petition pursuant to the provisions of Sections 1001, 1002, and 1003 of the Revenue Act of 1926, as amended by Section 603 of the Revenue Act of 1928, as amended by Section 1101 of the Revenue Act of 1932, as amended by Section 519 of the Revenue Act of 1934.

II

PRIOR PROCEEDINGS

On June 18, 1935, the Commissioner determined a deficiency in income tax against the taxpayer for the year 1930 in the amount of $11,753.40, and sent by registered mail a notice of said deficiency in accordance with the provisions of Section 272 of the Revenue Act of 1928, as amended by Section 501 of the Revenue Act of 1934. Thereafter, and on Sept. 14, 1935, the taxpayer filed an appeal from the said determination of the Commissioner with the United States Board of Tax Appeals.

The case was tried before the United States Board of Tax Appeals on May 4, 1938.

On October 21, 1938, the Board promulgated its findings of fact and opinion and on November 30, 1938, entered its decision, wherein it was ordered and decided that there is an overpayment in income tax for the year 1930 in the amount of $75.60.

35

III

NATURE OF CONTROVERSY

The questions presented to the Board were: (1) The date to be used in fixing the basic valuation of securities which taxpayer had received as remainderman of a testamentary trust after death of the life benficiary for the purpose of determining taxable gain or loss to taxpayer on the sale thereof; and (2) the date to be used for the purpose of determining the period for which these securities were held by taxpayer prior to their sale within the meaning of the capital net gains and losses provisions of the statute (Section 101 of the Revenue Act of 1928).

The taxpayer was remainderman of a testamentary trust under the will of his grandmother, who died in 1897. The life beneficiary, the taxpayer's mother, died on March 23, 1928, and on May 5, 1928, certain securities constituting the corpus of the trust were delivered to the taxpayer by the trustees in accordance with the terms of the testator's will. The securities thus received by taxpayer as remainderman may be divided into two categories, the first being those securities which had come to the trustees as a part of the trust *res* and the second being those securities which were purchased by the trustees with trust funds subsequent to March 1, 1913, and held by them until delivery to the taxpayer at the termination of the trust in 1928. Some of the securities were sold by the taxpayer in February 1930 and other securities were sold on May 6 and in June 1930. In

computing the gain or loss from the sale of these securities, taxpayer used their fair market value as of May 5, 1928, taking that date to be the "time of the distribution to the taxpayer," within the meaning of Section 113 (a) (5) of the Revenue Act of 1928. The Commissioner urged that as to the se-
36 curities which were a part of the original trust *res* the distribution by the executors of the testatrix's estate to the trustees constituted the "distribuion to the taxpayer" contemplated by the statute, and argued further (with respect to those securities which were acquired by the trustees with trust funds) that where trustees purchase property with trust funds and later distribute the property so acquired to the taxpayer, such property is not "acquired by will or intestacy" within the meaning of Section 113 (a) (5). The Board held that the provisions of Section 113 (a) (5) are controlling herein and that the taxpayer was entitled to use as the basis for determining gain "the fair market value of the property at the time of the distribution to the taxpayer." It was further held that the phrase "at the time of the distribu'ion to taxpayer," as used in the statute, means the time when this property was actually delivered to or made available for the use of the taxpayer. Applying this ruling to the facts hereinabove set out, the Board found that the time of the distribution to the taxpayer in the instant case was May 5, 1928, the date when the corpus of the trust was delivered to the taxpayer.

The Commissioner determined that the securities sold by the taxpayer in 1930 were "held by the taxpa[illegible]" within the meaning of Section 101 of the Revenue Act of [illegible] from the respective dates they were acquired by the trust estate and therefore having been held for more than two years, were capital assets. The taxpayer took as the controlling date May 5, 1928, the date of delivery of the trust corpus to the taxpayer. The Board held that it was unnecessary to decide whether the determinative date was May 5, 1928 (date of distribution) or March 23, 1928, the date of death of the life beneficiary, for the reason that the re-
sult in this case is the same whichever be taken. The
37 Board held that those securities sold in February 1930 had not been held by the taxpayer for more than two years and were therefore not capital assets while those sold on May 6 and in June 1930 had been held by taxpayer for more than two years and were therefore capital assets.

IV

ASSIGNMENTS OF ERROR

The Commissioner avers that in the record and proceeding before the Board of Tax Appeals and in the opinion and final

decision rendered and entered by the Board of Tax Appeals, manifest error occurred and intervened to the prejudice of the Commissioner who now assigns the following errors and each of them, which he avers occurred in said record, proceeding, opinion and final decision so rendered and entered by the Board of Tax Appeals:

1. The Board of Tax Appeals erred in holding and deciding that there is an overpayment in income tax for the year 1930 in the amount of $75.60.

2. The Board of Tax Appeals erred in failing to hold and decide that there is a deficiency in income tax for the year 1930 in the amount of $11,753.40.

3. The Board of Tax Appeals erred in holding and deciding that the phrase "the time of distribution to the taxpayer," as used in the statute, means the time when this property was actually delivered to or made available for the use of the taxpayer.

4. The Board of Tax Appeals erred in holding and deciding that the basis to taxpayer for the purpose of determin-
38 ing a gain or loss on the sale of the securities in question is the fair market value of such securities on May 5, 1928, the date when the corpus of the trust was delivered to taxpayer, and that this was the time of the "distribution to the taxpayer."

5. The Board of Tax Appeals erred in failing to hold and decide as to the securities which were a part of the original trust *res* that the distribution by the executors of the testatrix's estate to the trustees constituted the "distribution to the taxpayer," contemplated by the statute.

6. The Board of Tax Appeals erred in failing to hold and decide as to the securities which were acquired by the trustees with trust funds that such property is not "acquired by will or intestacy" within the meaning of Section 113 (a) (5) of the Revenue Act of 1928 and hence take as their basic cost to the trustees.

7. The Board of Tax Appeals erred in holding and deciding that those securities sold in February 1930, had not been held by the taxpayer for more than two years and were therefore not capital assets.

8. The Board of Tax Appeals erred in failing to hold and decide that the securities sold by the taxpayer in 1930 were "held by the taxpayer," within the meaning of Section 101 of the Revenue Act of 1928, from the respective dates they were acquired by the trust estate and therefore having been held for more than two years, were capital assets.

9. The Board of Tax Appeals erred in that its decision is not supported by the evidence and is contrary to law.

39 Wherefore, the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Second Circuit, that a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

(Signed) JAMES W. MORRIS,
Assistant Attorney General,
(Signed) J. P. WENCHEL
R. L. W.
(Signed) J. P. WENCHEL,
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
JOHN M. MORAWSKI,
Special Attorney,
Bureau of Internal Revenue.

40 [*Duly sworn to by John M. Morawski; jurat omitted in printing.*]

41 In United States Circuit Court of Appeals for the Second Circuit

B. T. A. Docket No. 81544

[Same title.]

Notice of filing petition for review

To BEN R. CLARK, Esq., and ALLIN H. PIERCE, Esq.,
2 Wall Street, New York, N. Y.

You are hereby notified that the Commissioner of Internal Revenue did, on the 8th day of February 1939, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 8th day of February 1939.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors

mentioned therein, is hereby acknowledged this 9th day of February 1939.

(Signed) BEN R. CLARK,
(Signed) ALLIN H. PIERCE,
Attorneys for Respondent on Review.

(Signed) J. P. WENCHEL,
R. L. W.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

42 In United States Circuit Court of Appeals for the Second Circuit

B. T. A. Docket No. 81544

[Same title.]

Notice of filing petition for review

To Mr. RICHARD VAN NEST GAMBRILL,
Peapack, New Jersey.

You are hereby notified that the Commissioner of Internal Revenue did, on the 8th day of February 1939, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 8th day of February 1939.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 10 day of March, 1939.

(Signed) RICHARD V. N. GAMBRILL,
Respondent on Review.

(Signed) J. P. WENCHEL,
R. L. W.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

43 Before the United States Board of Tax Appeals

Docket No. 81544

RICHARD VAN NEST GAMBRILL, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Stipulation of facts

It is hereby stipulated and agreed by and between the parties hereto acting by their respective counsel that for the purposes of the trial of this proceeding, or any hearing or rehearing with respect thereto, or any appeal therefrom or review thereof, the following facts shall be deemed to be proven without the submission of any proof other than this stipulation, without prejudice, however, to the right of either party to object to the materiality of any fact:

First. Mary Van Nest died a resident of the County of New York, State of New York, on the 20th day of November 1897, leaving a last will and testament which was duly admitted to probate by the Surrogate of the County of New York, letters testamentary being issued to Franklin W. Gilley, Giraud Foster and Thomas Thacher as executors.

The ninth article of this will reads in part as follows:

"NINTH. All the residue of my estate of every kind I give and devise as follows:

"'One half thereof in equal shares to my daughters Mary Van Nest Jackson, Anna Van Nest Gambrill, and Jennie Van Nest Foster, and my granddaughter, Mary Alice Van Nest absolutely.

44 "'The other half thereof in four equal shares to my executors, to hold the same in trust, one share for the benefit of each of the same four persons to wit my said three daughters and my said granddaughter and to receive the income and pay the same to her during her life with full power to invest and reinvest in their discretion without any limitation whatsoever and at her death to transfer and deliver the same as she if leaving issue shall by will direct or in the absence of such direction, to her issue equally, or if she shall leave no issue, then to the survivors of the said four persons to wit my said three daughters and my said granddaughter, and to the issue of any of the said four persons who may have died, the issue to take the share which the parent would have taken if living. * * *'"

Second. The executors above named proceeded with the administration of the estate and on or about the 4th day of January 1898, they delivered to themselves as trustees for Anna Van Nest Gambrill, the following securities at the following prices:

375 shs.	Farmers Loan & Trust Co. par value $25	$76,406.25
300 shs.	Harlem Railroad Co.	48,000.00
100 shs.	Pittsburgh & Fort Wayne Railroad	16,900.00
200 shs.	New York, N. H. & H. R. R.	36,600.00
300 shs.	Delaware, Lackawanna & Western Railroad	23,250.00
50 shs.	Rensselaer & Saratoga Railroad	9,250.00
75 shs.	Chicago & North Western Railroad, preferred	12,225.00
	Total	$222,631.25

45 Separate trusts were likewise set up by the trustees for each of the other three life beneficiaries named in the will of Mary Van Nest and securities of equal value as those set forth above in favor of Anna Van Nest Gambrill were delivered by the executors to themselves as trustees for Mary Van Nest Jackson, Jennie Van Nest Foster, and Mary Alice Van Nest.

Third. Anna Van Nest Gambrill, mother of petitioner and the life beneficiary of one of the aforesaid trusts, died on March 23, 1928, without having exercised the power of appointment conferred upon her by the ninth article of the will of Mary Van Nest. Her sole issue her surviving was the petitioner, Richard Van Nest Gambrill, who was born prior to the death of Mary Van Nest.

Fourth. Upon the death of said Anna Van Nest Gambrill, the trustees of the trust for her benefit under the will of Mary Van Nest proceeded with the settlement of their accounts. One of the matters which had to be settled before the trustees could make distribution of the corpus to the petitioner as remainderman was the question of additional inheritance taxes due to the State of New York from the estate of Mary Van Nest on the said remainder interest. In the original appraisal of the estate of Mary Van Nest, filed for the purpose of determining the New York State inheritance tax, the appraiser reported that the value of this remainder interest was not at that time ascertainable and the collection of the inheritance tax on this remainder interest was therefore held in abeyance under the provisions of Section 221, Chapter 908, laws of 1896 of the State of New York. Under this section the tax on the said remainder interest would become due and payable when the person or persons beneficially entitled thereto should come into actual possession or enjoyment thereof. The tax was made a lien upon the property
46 transferred and the law provided that no trustee should

be entitled to a final accounting unless he should produce a receipt sealed and countersigned by the Comptroller of the State of New York, or a copy thereof certified by him unless a bond should have been filed as prescribed by law. On or about the 16th day of April 1928, the trustees by their attorney filed a petition in the Surrogate's Court for the County of New York, asking for an order modifying the original order fixing the New York State inheritance tax on the estate of Mary Van Nest, and on or about the 1st day of May 1928, an order was entered assessing a tax of $2,359.91 upon the value of the remainder interest passing to the petitioner. This tax was paid on or about the 24th day of May 1928.

Fifth. Other payments made by the trustees prior to the transfer and delivery of the corpus to the petitioner included fees for legal services, commissions to the trustees on receiving gain on the corpus of the trust and for paying out the corpus of the trust, payments to the executors of the estate of Anna Van Nest Gambrill for income collected after her death, fees for services in preparing Federal and State income tax returns and payments to the trustees for commissions on income. Other transactions by the trustees after the death of the life tenant included the sale of $40,000. New York City 4's of 1936, the sale of which was required in order to raise funds for the payment of the trustees' commissions and for the payment of the New York State inheritance tax on the remainder interests passing to the petitioner.

Sixth. There was no judicial settlement of the accounts of the trustees, but the trustees accounted by receipt and release, the release being signed on May 22, 1928, by the petitioner individually, and by Lewis Cass Ledyard, Jr., and the petitioner as executors of the last will and testament of Anna Van Nest Gambrill. The balance of the corpus included in the trust as
47 to which this petitioner was remainderman was delivered to the petitioner in accordance with the terms of the will of Mary Van Nest on or about May 5, 1928.

Seventh. During the calendar year 1930, the petitioner sold certain of the securities so delivered to him by the said trustees. In computing gain or loss from the sale of these securities, the petitioner used their fair market value as of May 5, 1928. These securities sold in 1930, together with the proceeds received there-

for, the dates of sale and the fair market value as of May 5, 1928, are as follows:

Name of securities	Date of sale 1930	Proceeds	May 5, 1928 value
$2,000 Third Avenue Railroad 4/60	Feb. 18	$1,015.00	$1,440.00
54 shs. United States Steel, preferred	Feb. 18	7,625.34	7,830.00
122 shs. Manhattan Railway	Feb. 20	4,544.62	7,160.75
50 shs. Rensselaer & Saratoga Railroad	Feb. 19	6,898.00	7,275.00
100 shs. Pittsburgh, Fort Wayne & Chicago Railway	Feb. 20	15,096.00	16,400.00
10 shs. Chicago & Eastern Illinois Railway, preferred	Feb. 21	400.85	762.50
405 shs. Glen Alden Coal	May 6	40,380.30	66,369.38
405 shs. Lackawanna securities	June 4	16,616.80	20,057.35
200 shs. National City Bank	June 9	39,022.44	35,700.00
Total		$131,599.35	$163,004.98

48 Eighth. The March 1, 1913, fair market value of the securities acquired prior to that date, or the cost, whichever is greater, and the cost to the trustees of the securities acquired after March 1, 1913, are as follows:

Name of securities	Acquired by trustees	March 1, 1913 or cost to trustees
$2,000 Third Avenue Railroad 4/60	March 12, 1912	$1,717.50
54 shs. United States Steel, preferred	Sept. 9, 1921	5,889.93
122 shs. Manhattan Railway	Prior to March 1, 1913	15,982.00
50 shs. Rensselaer & Saratoga Railroad	Prior to March 1, 1913	9,025.00
100 shs. Pittsburgh Fort Wayne & Chicago Railway	Prior to March 1, 1913	16,200.00
10 shs. Chicago & Eastern Illinois Railway, preferred	Prior to March 1, 1913	516.14
405 shs. Glen Alden Coal	August 16, 1921	2,025.00
405 shs. Lackawanna securities	Sept. 16, 1927	9,846.46
200 shs. National City Bank	Prior to March 1, 1913	10,344.00
Total		$71,546.03

Ninth. The fair market values of these securities as of March 23, 1928, the date of the death of the life beneficiary Anna Van Nest Gambrill are as follows:

49 Name of securities	Adjusted value March 23, 1928
$2,000 Third Avenue Railroad 4/60	$1,380.00
54 shs. United States Steel, preferred	7,830.00
122 shs. Manhattan Railway	5,154.50
50 shs. Rensselaer & Saratoga Railroad	7,225.00
100 shs. Pittsburgh, Fort Wayne & Chicago Railway	16,500.00
10 shs. Chicago & Eastern Illinois Railway, preferred	700.00
405 shs. Glen Alden Coal	62,471.25
405 shs. Lackawanna securities	19,398.46
200 shs. National City Bank	31,400.00
Total	$152,059.21

Tenth. In determining the period for which the petitioner had held these securities, under the provisions of Section 101 of the Revenue Act of 1928, the petitioner used the date May 5, 1928,

whereas the respondent has determined that the period held should be computed from the 20th day of November 1897, the date of the death of Mary Van Nest in the case of securities owned by her at the time of her death and from the dates of purchase in the case of securities subsequently purchased by the trustees.

(Signed) BEN R. CLARK,
Ben R. Clark,
Counsel for Petitioner,
Office & Post Office Address,
2 Wall Street, New York, New York.
(Signed) J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

50 In United States Circuit Court of Appeals for the Second Circuit

B. T. A. Docket No. 81544

Praecipe for record

To the CLERK OF THE UNITED STATES BOARD OF TAX APPEALS:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Second Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Second Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries.
2. Pleadings:
   (a) Petition.
   (b) Answer to Petition.

51 3. Findings of Fact and Opinion promulgated October 21, 1938.

4. Decision entered November 30, 1938.
5. Petition for Review.
6. Notices of Filing Petition for Review.
7. Stipulation of Facts.
8. Praecipe for Record.

Service of a copy of the within praecipe is hereby admitted this 23 day of February 1939.

(Signed) BEN R. CLARK,
(Signed) ALLIN H. PIERCE,
Attorneys for Respondent on Review.
(Signed) J. P. WENCHEL,
R. L. W.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

52 [Clerk's certificate to foregoing transcript omitted in printing.]

53 In United States Circit Court of Appeals for the Second Circuit

Nos. 41-257-258-259—October Term 1939

(Argued Febrary 15, 1940. Decided June 10, 1940)

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

RICHARD VAN NEST GAMBRILL, RESPONDENT

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

MARJORIE K. CAMPBELL, RESPONDENT

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

SEYMOUR H. KNOX, RESPONDENT

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

DOROTHY K. G. ROGERS, RESPONDENT

54 Petitions by the Commissioner of Internal Revenue to review determinations of the United States Board of Tax Appeals in respect to income taxes of the respondents Gambrill and Knox for the year 1930, and of the respondents Campbell and Rogers for the year 1933. Affirmed.

Before SWAN, AUGUSTUS N. HAND, and PATTERSON, Circuit Judges.

Sewall Key, Acting Assistant Attorney General, J. L. Monarch and Newton K. Fox, Special Assistants to the Attorney General, Counsel for the Commissioner of Internal Revenue in the proceeding against the respondent Gambrill. Samuel O. Clark, Assistant Attorney General, Sewall Key and Arthur A. Armstrong, Special Assistants to the Attorney General, Counsel for the Commissioner of Internal Revenue in the proceedings against the respondents Campbell, Knox, and Rogers. Sidney W. Davidson, Ben R. Clark, and Allin H. Pierce, Counsel for the respondent Gambrill. James McCormick Mitchell, John L. Kenefick, and Ralph M. Andrews, Counsel for the respondents Campbell, Knox, and Rogers.

55 Opinion

AUGUSTUS N. HAND, Circuit Judge:

The foregoing proceedings all involve the correctness of income tax assessments by the Commissioner of Internal Revenue and in each the Commissioner has appealed from decisions of the Board of Tax Appeals modifying his assessments.

In the Gambrill case the Commissioner assessed an income tax deficiency of $11,753.40 for the year 1930, while the Board of Tax Appeals determined that there was an overpayment of $75.60 by the taxpayer. In the Knox case the Commissioner assessed a deficiency for the same year of $35,645.83 while the Board determined that there was a deficiency of $42,842 (arising, however, from adjustments not here in issue). In the Campbell case the Commissioner assessed an income tax deficiency of $86,937.47 for the year 1933, and in the Rogers case a deficiency of $65,549.60 for the same year. The Board found that there was no income tax deficiency on the part of either Campbell or Rogers. We think that its orders in all four proceedings should be affirmed.

In each of the above cases the taxpayer involved was given a remainder interest in a trust created by will. Certain personal securities that were a part of the corpus of the particular trust were delivered by the trustee to the taxpayer after the right to possession became fixed by the termination of the prior beneficial estate. Some of these securities were acquired by the testator during his lifetime, some of them were purchased by the executor after the testator's death before setting up the trust, and some were purchased by the trustee after the trust was established. Securities derived by the trustee in the various ways mentioned

were delivered by him to the taxpayer and sold by the latter.

56 In assessing income taxes upon alleged profits realized by the taxpayer the Commissioner used the following bases for computing gains: In the case of securities which had been owned by the decedent, their fair market value at the time when distributed by the executor to the trustee; in the case of securities purchased by the executor or trustee, the cost to such fiduciary; in respect to certain securities purchased by a fiduciary prior to March 1, 1913, as in Gambrill's case, the value on that date, whenever cost was unknown. The Board of Tax Appeals, however, took the view that, because of the provisions of Section 113 (a) (5) of the Revenue Acts of 1928 and 1932, the proper basis in all cases was the fair market value of the securities at the "time of the distribution to the taxpayer" by the trustee, no matter when or how the trustee or the executor might have derived the particular securities.

In determining how long a taxpayer had held securities for the purpose of computing capital gain or loss under Section 101 of the Revenue Act of 1928 the Board used the dates of delivery of the securities by the trustee to the taxpayer. The Commissioner, on the other hand, used the date of the death of the testator as the beginning of the period of holding securities owned by the latter and the date of purchase by the fiduciary as the beginning in cases where securities were purchased by the executor or trustee.

We agree with the conclusion of the Board that Sections 113 (a) (5) of the Revenue Acts of 1928 and 1932 govern the computation of loss or gain in the cases before us. The pertinent provisions read as follows:

"(a) Property acquired after February 28, 1913.—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * *

57 "(5) Property Transmitted at Death.—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the tax-

payer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death; * * *"

None of the securities involved in the cases before us were acquired "by specific bequest" or were "acquired by the decedent's estate from the decedent." They were all directly acquired from testamentary trustees. Accordingly the basis was not "the fair market value of the property at the time of the death of the decedent." Therefore the third clause of Section 113 (a) (5) which embraces "all other cases" of property acquired by will is controlling. That clause provides that: "In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer."

58 The words "the property" in the foregoing sentence seem inevitably to relate to the particular property sold by the taxpayer to whom it was distributed by the trustee. The term "taxpayer" is defined by Section 701 (a) (13) of the Revenue Acts of 1928 and 1932 as "any person subject to a tax imposed by this Act." It is hard to imagine language which would more clearly fix the basis for computing the gain or loss realized upon the sales of the securities with which the Commissioner had to deal than the words "fair market value of the property at the time of the distribution to the taxpayer."

Perhaps the most strenuous objection made by the Commissioner to adopting what seems to be the clear meaning of the statute is that increment in value between the date of the decedent's death and the time of distribution to the taxpayer is not subjected to taxation when the securities are sold and thus tax resources are impaired. But it is frequently true that increments are not subjected to taxation. One common case where increment in value is disregarded is that which occurs during the lifetime of an owner of securities which are not sold by him but are sold after his death by his executors, administrators, trustees, or remaindermen under his will. Such an increment accruing during the lifetime of the owner of securities has never been taken into account in computing gain or loss upon sales after his death. Increment between the date of death of the owner of securities and the date of distribution by an executor to a legatee is also to be disregarded under the third clause of Section 113 (a) (5) in the case of dis-

tribution of securities which are transmitted by virtue of a general bequest.

The supposed loss in revenue due to a disregard of fluctuations in the market value of securities between the date of death
59 and the time of distribution is moreover somewhat fanciful, for in all cases where the property depreciates in value between the date of death and the date of distribution a larger tax would result from fixing the basic value at "the time of the distribution to the taxpayer" than from fixing the basis at the time of the testator' death.

The further contention of the Commissioner that the word "taxpayer" as used in the third clause of Section 113 (a) (5) should be construed as meaning the "trustee" and that the phrase "time of the distribution to the taxpayer" ought to be interpreted as meaning "the date when the executors transferred the property to the trustees," seems to us without warrant. The taxpayers here are undoubtedly the respondents. The trustees are separate entities and as such are neither agents of the respondents nor mere passive fiduciaries. It is true that under certain circumstances they might themselves have become taxpayers in respect to the corpus of their trusts, but only in case they had made sales of some of the securities composing the corpus—not, as here, when without making any sales they wound up their trusts and distributed the corpus to remaindermen. To treat the trustee and beneficiary remainderman, as the Commissioner wishes us to do, as a "sort of dual tax personality" is to disregard the plain language of the statute and to adopt a concept which seems to us to defy analysis. In view of the clear terms of the third clause of Section 113 (a) (5) it can make no difference whether the interest of any remaindermen be vested, vested subject to be divested, or contingent. In either event the basis should be "the fair market value at the time of the distribution to the taxpayer," i. e., to the respondent whose income taxes are being reviewed, and not to the trustee.

In respect to the securities purchased either by the executors or trustees the Commissioner says they do not come within the third clause of Section 113 (a) (5) because they were not acquired
60 by will. This requires a most technical interpretation of the clause and one that in our opinion is not sound even technically. Any property distributed by a trustee which is part of the corpus of the trust is acquired through and by virtue of the will. Through the will the remaindermen derived all their interest and without it they would have had no standing and would have received nothing. Lyeth v. Hoey, 305 U. S. 188, 194–195.

It is further argued that the Senate Report in respect to the enactment of Section 113 (a) (5) in the 1928 Act justified the Commissioner's interpretation of the statute. In dealing with the

third clause the report said: "It would also apply in cases where the executor purchases property and distributes it to the beneficiary." There is, however, no reason because of this mention of purchases by the executor for limiting the application of the report to property so purchased. In cases where a trust has been created by will the executor will often act as trustee before the trust is actually set up and sometimes will sell and purchase securities on behalf of the trust. Indeed the statement in the Senate Report would not cover the particular facts before us except in situations where the executor so acted.

The Commissioner apparently contends that the decision in Brewster v. Gage, 280 U. S. 327, fixing the date of death as the time when property should be valued under the provisions of the Revenue Act of 1921, for the purposes of computing gain or loss, affords some guide in interpreting Section 113 (a) (5). The difficulty in maintaining such a contention is that Section 113 (a) (5) is specific, that it fixes a different date for valuing acquisitions of property from that of the Act of 1921, and that the opinion in Brewster v. Gage says at page 337: "The deliberate selection of language so differing from that used in the earlier acts indicates that a change of law was intended."

In United States v. Nostrand, 94 F. (2d) 510, and Commis-
61 sioner v. Libbey, 100 F. (2d) 458, the Court of Appeals of the First Circuit held that the basis for computing gain or loss to the taxpayer was the market value of the property at the time of distribution by the trustee to the remaindermen, and not the value at the time of distribution by the executor to the trustees. These decisions, rather than that of the Seventh Circuit in Commissioner v. Maguire rendered on March 5, 1940, are in accord with our view.

The second question is whether the securities passing to the respondents Gambrill and Knox were held by them for more than two years and hence whether any gain or loss realized by the sale was taxable not as ordinary income or loss but as a capital gain or loss because the securities were "capital assets" as defined in Section 101 (c) (8) and (B) of the Revenue Act of 1928. The Board held that they were not, and they plainly were not unless the period during which they were held by the trustees can be added to the period between the date of distribution to the taxpayers and the date of sale. There cannot be any such tacking because the property, when held by the respective respondents, did not have "for the purpose of determining gain or loss from a sale * * *, the same basis * * * in his hands as it would have in the hands" of the trustees.

On behalf of the Commissioner it is argued that the decision of the Supreme Court in McFeeley v. Commissioner, 296 U. S.

102, requires us to find that the securities had been held from the date of death and that they therefore were held for more than two years prior to sale. That decision, however, involved an estate where there was no trust. The court only decided that the general legatee held the securities which were transferred to him by the executor from the date of death. We agree with the Board that the intervening trusts broke the continuity so that the taxpayer only held the securities from the time they were distributed to him.

62 In the Campbell case certain Woolworth stock was purchased by the taxpayer prior to distribution to her by the trustee of other shares of the same kind. If she did not hold the shares she acquired under the will until they were distributed to her by the trustee, under the "first-in-first-out" rule, her own shares should be treated as sold prior to those which were delivered to her by the trustee. We agree with the Board that her own shares must be regarded as sold first. During the time that the title to the shares remained in the trustee the taxpayer had no control over their disposition and they were not acquired until she obtained them as her own. Helvering v. San Joaquin Fruit & Investment Co., 297 U. S. 496.

The orders of the Board of Tax Appeals are affirmed.

63 In United States Circuit Court of Appeals, Second Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

RICHARD VAN NEST GAMBRILL, RESPONDENT

Appeal from the United States Board of Tax Appeals

Judgment

Filed June 28, 1940

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

D. E. ROBERTS, *Clerk.*

64 [File enlorsement omitted.]

65 [Clerk's certificate to foregoing transcript omitted in printing.]

66 Supreme Court of the United States

Order allowing certiorari

Filed November 12, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1941

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HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* GAMBRILL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 472. Argued March 6, 1941.—Decided March 31, 1941.

1. Under § 113 (a) (5) of the Revenue Act of 1928, the basis for ascertaining gain or loss from the sale of property delivered to the taxpayer by testamentary trustees is its value when distributed by the executors to the trustees if the property was owned by the decedent at death, and cost to the trustees if it was purchased by them. *Maguire* v. *Commissioner, ante,* p. 1. P. 13.
2. For the purpose of determining whether property delivered to a taxpayer by testamentary trustees was "capital assets" within the capital gains and losses provisions of the Revenue Act of 1928, the period for which the taxpayer has held the property (although a remainder interest) dates from the death of the decedent in the case of property owned by the decedent at death, and from the date of purchase in the case of property purchased by the trustees. P. 14.
3. "Property held by the taxpayer," as used in § 101 (c) (8) of the Revenue Act of 1928, embraces not only full ownership but also any interest whether vested, contingent, or conditional. P. 15.

112 F. 2d 530, reversed.

CERTIORARI, 311 U. S. 639, to review the affirmance of a decision of the Board of Tax Appeals, 38 B. T. A. 981, redetermining a deficiency in income tax.

Miss Helen R. Carloss argued the cause, and *Solicitor General Biddle, Assistant Attorney General Clark,* and *Messrs. Sewall Key, Thomas E. Harris,* and *Arthur A. Armstrong* were on the brief, for petitioner.

Mr. Allin H. Pierce, with whom *Mr. Sidney W. Davidson* was on the brief, for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The questions involved here are in part the same as those in *Maguire* v. *Commissioner, ante,* p. 1. Respond-

ent was a remainderman under a trust created by the will of his grandmother [1] who died in 1897. The trust *res*, consisting of personalty, was delivered by the executors to themselves as trustees in 1898. The life beneficiary, respondent's mother, died in March, 1928. On May 5, 1928, the trustees delivered the corpus to respondent as remainderman. Some of the property was part of the original trust *res*, and some was purchased by the trustees both prior to and subsequent to March 1, 1913. During the year 1930 (in February, on May 6, and in June) respondent sold some of the property in each group. The Board of Tax Appeals (38 B. T. A. 981) and the Circuit Court of Appeals (112 F. 2d 530) held: (1) that for the purpose of determining gain or loss on the sale of the property in question the basis to respondent by virtue of § 113 (a) (5) of the Revenue Act of 1928 (45 Stat. 791) was the fair market value of the property on the date when the corpus was delivered to

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[1] Respondent was the sole surviving issue of his mother, Anna Van Nest Gambrill, and took under the following provisions of his grandmother's will:

"Ninth. All the residue of my estate of every kind I give and devise as follows:

'One half thereof in equal shares to my daughters Mary Van Nest Jackson, Anna Van Nest Gambrill, and Jennie Van Nest Foster, and my granddaughter, Mary Alice Van Nest absolutely.

'The other half thereof in four equal shares to my executors, to hold the same in trust, one share for the benefit of each of the same four persons to wit my said three daughters and my said granddaughter and to receive the income and pay the same to her during her life with full power to invest and reinvest in their discretion without any limitation whatsoever and at her death to transfer and deliver the same as she if leaving issue shall by will direct or in the absence of such direction, to her issue equally, or if she shall leave no issue, then to the survivors of the said four persons to wit my said three daughters and my said granddaughter, and to the issue of any of the said four persons who may have died, the issue to take the share which the parent would have taken if living.'"

respondent; and (2) that the property sold in February, 1930 had not been held by the taxpayer for more than two years and was, therefore, not a capital asset within the meaning of § 101 (c) of the 1928 Act, while that sold on May 6 and in June, 1930, had been held by respondent for more than two years and was therefore a capital asset.

The rulings on the first question were erroneous. For the reasons stated in *Maguire* v. *Commissioner, supra,* the basis under § 113 (a) (5) for the property delivered to respondent by the testamentary trustees was its value when distributed by the executors to the trustees if the property was owned by the decedent at her death, and cost to the trustees if it was purchased by them.[2]

We also disagree with the disposition made of the second question. Capital gains or losses are defined as those resulting from sales or exchanges of capital assets. § 101 (c) (1) and (2). Capital assets are defined (with exceptions not material here) as "property held by the taxpayer for more than two years." § 101 (c) (8). And § 101 (c) (8) (B) provides: "In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the

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[2] It should, of course, be noted that § 113 (b) provided:

"(b) Property acquired before March 1, 1913.—The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, shall be:

(1) the cost of such property (or, in the case of such property as is described in subsection (a) (1), (4), (5), or (12) of this section, the basis as therein provided), or

(2) the fair market value of such property as of March 1, 1913, whichever is greater. * In determining the fair market value of stock in a corporation as of March 1, 1913, due regard shall be given to the fair market value of the assets of the corporation as of that date."

same basis in whole or in part in his hands as it would have in the hands of such other person."

We are of the view that under these provisions respondent's holding period dates from the decedent's death for property which she then owned and from the date of purchase for property purchased by the trustees. In *McFeely* v. *Commissioner*, 296 U. S. 102, this Court held that a legatee's holding period under § 101 (c) (8) of the 1928 Act dated from the decedent's death for property owned by the decedent and distributed to the legatee by the executors, in spite of the fact that the legatee's basis under § 113 (a) (5) was value at the time of distribution to him by the executors. The date of acquisition was held to be the date of death, regardless of the gap between that date and the date of distribution. And that result was reached even though some of the taxpayers involved were residuary legatees whose interests at date of death were not unconditional. The reasoning of that case plus § 101 (c) (8) (B) make it plain that respondent's interest, albeit a remainder, was acquired at the date of decedent's death for property then owned and at the date of purchase for property purchased by the trustees. The continuity in his holding was not broken by the intervening trust. The formal constitution of that trust though of special significance under § 113 (a) (5) (*Maguire* v. *Commissioner*, *supra*) did not change the basic quality of his property interest. And the fact that that interest did not ripen into full and complete ownership except by the passage of time or the occurrence of subsequent events is inconsequential. For § 101 (c) (8) (B) provides, as we have seen, that in determining the taxpayer's holding period there shall be included the period for which the property was held by any other person if under § 113 the property had the same basis in whole or in part in the taxpayer's hands as it would have in the hands of the other person. It is plain that under

§ 113 the basis to the trustees was the same as the basis to the taxpayer. Hence the period of their holding is not to be excluded from the period of the taxpayer's holding. That makes plain that "property held by the taxpayer" as used in § 101 (c) (8) embraces not only full ownership but also any interest whether vested, contingent, or conditional. Otherwise the period of the holding by trustees would not be included in the holding by a mere remainderman. Hence, as in *McFeely* v. *Commissioner, supra,* we look to the time when the taxpayer first acquired the interest which later ripened into full ownership. It is plain that for property owned by the decedent he acquired that interest at her death and that for property purchased by the trustees he acquired that interest at the date of purchase.

Reversed.

The CHIEF JUSTICE and MR. JUSTICE ROBERTS think the judgment should be affirmed for the reasons stated by the court below, 112 F. 2d 530.

HELVERING, COMMISSIONER OF INTERNAL REVENUE, *v.* CAMPBELL.*

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 473. Argued March 6, 1941.—Decided March 31, 1941.

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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 472

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

RICHARD VAN NEST GAMBRILL

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 28, 1940
CERTIORARI GRANTED NOVEMBER 12, 1940

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Proceedings before United States Board of Tax Appeals	1	1
Docket entries	1	1
Petition	3	2
Exhibit A—Notice of Deficiency dated June 18, 1935, sent to Richard Van Nest Gambrill by the office of the Commissioner of Internal Revenue	10	5
Answer	17	8
Findings of fact and opinion, Van Fossan, M	18	9
Decision	32	17
Petition for review and assignments of error	33	18
Notices of filing petition for review	41	22
Stipulation of facts	43	24
Praecipe for record	50	28
Certificate of clerk [omitted in printing]	52	29
Proceedings in U. S. C. C. A., Second Circuit	53	29
Opinion, Hand, J	53	30
Judgment	63	35
Clerk's certificate [omitted in printing]	65	36
Order allowing certiorari	66	36

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1 Before United States Board of Tax Appeals

Docket No. 81544

RICHARD VAN NEST GAMBRILL, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT,

Docket entries

Appearances: For Taxpayer—Sidney W. Davidson, Esq.; Ben R. Clark, Esq., Allin H. Pierce, Esq. For Comm'r—W. Frank Gibbs, Esq.

1935

Sept. 14—Petition received and filed. Taxpayer notified (Fee paid)
Sept. 14—Copy of petition served on General Counsel.
Oct. 11—Answer filed by General Counsel.
Oct. 16—Copy of answer served on taxpayer.

1937

Sept. 9—Hearing set 12/9/37.
Oct. 30—Motion to place on Circuit Calendar for hearing in New York City filed by taxpayer. 11/1/37 granted.

2 1938

Feb. 26—Hearing set April 25, 1938, at New York City.
May 4—Hearing had before Mr. Van Fossan, Div. 9 on merits. Submitted. Stipulation of facts filed. Entry of appearance of A. H. Pierce filed. No brief for petitioner. Respondent's brief due June 1, 1938—petitioner's reply due June 16, 1938.
May 16—Transcript of hearing of May 4, 1938, filed.
May 28—Brief filed by General Counsel.
Jun. 16—Reply brief filed by taxpayer. 6/16/38 copy served.
Oct. 21—Findings of fact and opinion rendered, Ernest H. Van Fossan, Div. 9. Decision will be entered under Rule 50.
Nov. 14—Computation of deficiency filed by General Counsel.
Nov. 18—Hearing set Nov. 30, 1938, on settlement.
Nov. 23—Consent to settlement filed by taxpayer.
Nov. 30—Decision entered, Ernest H. Van Fossan, Div. 9.

1939
Feb. 8—Petition for review by U. S. Circuit Court of Appeals (2) with assignments of error filed by General Counsel.
Feb. 14—Proof of service filed by General Counsel.
Mar. 1—Praecipe for record filed by General Counsel with proof of service thereon.
Mar. 14—Proof of service filed by General Counsel.

3 Before United States Board of Tax Appeals

Docket No. 81544

[Same title.]

Petition

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency IT:AR:A-2:MEK-90D, dated June 18, 1935, and as a basis of his proceeding alleges as follows:

1. The petitioner is an individual with his residence at Peapack, New Jersey.

2. The Notice of Deficiency, a copy of which is attached and marked Exhibit A, was mailed to the petitioner on June 18, 1935.

3. The taxes in controversy are income taxes for the calendar year 1930 and in the amount of $11,753.40.

4. The determination of tax set forth in said Notice of Deficiency is based upon the following errors:

(a) The Commissioner of Internal Revenue has erred in holding that the basis for determining gain or loss from the sale or other disposition of certain securities received by the petitioner as remainderman, after the death of the life beneficiary, of a trust created under the last will and testament of Mary Van Nest is the cost to the trustees of the securities purchased
4 by them after March 1, 1913, or the fair market value as of March 1, 1913, of such securities as were acquired prior to that date.

(b) The Commissioner of Internal Revenue has erred in holding that in determining the period for which these securities had been held by the petitioner under the provisions of Section 101 of the Revenue Act of 1928, the date March 1, 1913, or the date on which the securities were purchased by the trustees, were acquired subsequent to that date, should control

5. The facts upon which the petitioner relies as a basis of this proceeding are as follows:

(a) Under the will of the petitioner's grandmother, Mary Van Nest, who died on November 20, 1897, a trust was created for the benefit of her daughter Anna Van Nest Gambrill, the will providing that the income of the trust should be paid to the said Anna Van Nest Gambrill for life and that upon her death the trustees were to "transfer and deliver the same as she, if leaving issue, shall by will direct, or, in the absence of such direction, to her issue equally." Anna Van Nest Gambrill died on March 23, 1928, without exercising the power of appointment conferred upon her by the will of Mary Van Nest and according to the terms of the said will of Mary Van Nest the trustees in due course transferred the corpus of the trust to the petitioner, who was the sole surviving issue of Anna Van Nest Gambrill.

(b) Upon the death of the life beneficiary on March
5 23, 1928, the trustees of the trust under the will of Mary Van Nest proceeded with the settlement of their accounts. One of the matters which had to be settled before the trustees could make distribution of the corpus to the remainderman was the question of further taxes due to the State of New York from the estate of Mary Van Nest for inheritance tax on the said remainder interest. In the original appraisal of the estate of Mary Van Nest, filed for the purpose of determining the New York State inheritance tax, the appraiser reported that the value of this remainder interest was not at that time ascertainable, and the collection of the inheritance tax on this remainder interest was therefore held in abeyance under the provisions of Section 221, Chapter 908 of the Laws of 1896 of the State of New York. Under this section the tax on the said remainder interest would become due and payable when the person or persons beneficially entitled thereto should come into actual possession or enjoyment thereof. The tax was made a lien upon the property transferred and the law provided that no trustee should be entitled to a final accounting unless he should produce a receipt sealed and countersigned by the Comptroller of the State of New York, or a copy thereof certified by him, unless a bond should have been filed as prescribed by law. The trustees on or about April 16, 1928, by their attorney, filed a petition in the Surrogate's Court for the County of New York asking for an order modifying the original order fixing the New York State inheritance tax on the estate of Mary Van Nest and on or about May 1, 1928, such an order was entered assessing a tax of $2,359.91 upon the value of the remainder interest passing to the petitioner. This additional tax was paid on or about May 24, 1928.

6 (c) The trustees made other payments prior to distribution to the petitioner, which payments included fees to one of the trustees for legal services, commissions to the

trustees or receiving gain on the corpus of the trust and for paying out the corpus of the trust, payments to the executors of the estate of Anna Van Nest Gambrill for income collected after her death, fees for services in preparing Federal and state income tax returns and payments to the trustees for commissions on income. Further transactions had by the trustees after the death of the life tenant included the sale of $40,000. of New York City 4% bonds, the sale of which was necessary in order to raise funds for the payment of the trustees' commissions and for the payment of the New York State inheritance tax on the remainder interests passing to the petitioner.

(d) There was no judicial settlement of the accounts of the trustees, but the trustees accounted by receipt and release, the release being signed on May 22, 1928, by the petitioner individually, and by Lewis Cass Ledyard, Jr. and the petitioner as executors of the last will and testament of Anna Van Nest Gambrill. The balance of the corpus included in the trust was distributed to the petitioner on or about May 5, 1928.

(e) Certain of the securities included in the said remainder interest so distributed to the petitioner on May 5, 1928, were sold by him during the calendar year 1930. On his Federal income tax return filed on or before March 15, 1931, gain or loss
7 from the sale of these securities was determined by using as the basis for these securities their fair market value as of May 5, 1928. These sales resulted in a loss of $31,305.63 of which amount $5,188.44 was claimed as an ordinary current loss and the balance of $26,117.19 was claimed as a loss from the sale of capital assets as defined by Section 101 of the Revenue Act of 1928. In determining the period for which these securities had been held, the petitioner used the date May 5, 1928, and all of the securities which were sold subsequent to May 5, 1930, were treated as capital assets.

(f) The Commissioner of Internal Revenue in his Notice of Deficiency (Exhibit A) has recomputed the gain or loss from the sale of these securities and has used as a basis for the same the March 1, 1913, value of such securities as were included in the trust prior to March 1, 1913, and the cost of the trustees of such securities as were purchased subsequent to March 1, 1913. In determining the period for which the petitioner had held the securities, the Commissioner of Internal Revenue has used the date March 1, 1913, for securities included in the trust prior to that date and the dates of purchase by the trustees for the securities acquired subsequent to March 1, 1913.

Wherefore the petitioner prays that this Board may hear the proceeding and make a correct determination of his tax liability and grant relief from the deficiency asserted by the

respondent against him in the Notice of Deficiency (Exhibit A) in the following particulars:

(a) The petitioner prays that this Board may find that
8 in determining gain or loss realized from the sale of the securities received by him as remainderman of the trust under the will of Mary Van Nest the basis should be the fair market value of the said securities as of May 5, 1928.

(b) The petitioner prays that this Board may find that in determining the period for which the petitioner held the securities received by him as remainderman of the trust under the will of Mary Van Nest under the provisions of Section 101 of the Revenue Act of 1928, the petitioner held such securities from May 5, 1928, to the respective dates of sale.

(c) The petitioner prays that this Board may find that there is no deficiency due on the petitioner's Federal income tax return for the calendar year 1930, and that the proposed deficiency of $11,753.40 should be abated and set aside.

Dated September 11, 1935.

(S) SIDNEY W. DAVIDSON,
Sidney W. Davidson,
(S) BEN R. CLARK,
Ben R. Clark,
Counsel for Petitioner,
Office & Post Office Address, 2 Wall Street,
New York, New York.

9 [*Duly sworn to by Richard Van Nest Gambrill; jurat omitted in printing.*]

10 *Exhibit A annexed to petition*

Address reply to Commissioner of Internal Revenue.

OFFICE OF
COMMISSIONER OF INTERNAL REVENUE,
TREASURY DEPARTMENT,
Washington, June 18, 1935.

Mr. RICHARD VAN NEST GAMBRILL,
C/o Carter, Ledyard & Milburn,
2 Wall Street, New York, N. Y.

SIR: You are advised that the determination of your income tax liability for the year (x) 1930, discloses a deficiency of $11,753.40 as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1928, as amended by section 501 of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within

ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing and filing of this form will expedite the closing of your return (x) by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner.
By CHAS. T. RUSSELL,
Deputy Commissioner.

Enclosures:
Statement.
Form 870.

STATEMENT

IT:AR:A-2.
MEK-90D.

In re: Richard Van Nest Gambrill,
% Carter, Ledyard & Millburn,
2 Wall Street,
New York, New York

Income Tax Liability

Year 1930: Income tax liability, $36,289.04; income tax assessed, $24,535.64; deficiency, $11,753.40.

The deficiency as shown herein results from adjustments as shown in the report of Internal Revenue Agent C. A. Broach dated September 26, 1932, a copy of which was transmitted to you on November 18, 1932, and to such adjustments made as a result of the conferences held in this office on June 27, 1934, November 7, 1934, and May 13, 1935.

In determining gain or loss on the sale of securities received by you as remainderman of a trust created under the will of Mary Van Nest who died on November 20, 1897, there is used

the same basis as in the hands of the trustee that is the cost of the securities to the trustee or the March 1, 1913 value of such securities as were acquired prior to March 1, 1913, inasmuch as the actual cost is unknown.

In accordance with G. C. M. 14893, Internal Revenue Bulletin Volume XIV, No. 21, where a testator who died in 1910 directed that his estate be held in trust for a period of ten years after his death and at the end of that period be distributed to certain beneficiaries, securities forming a part of the estate were "acquired" by the beneficiaries at the date of death of the testator. The basis of the securities transferred to the beneficiaries in 1920 is the value of the securities at the date of distribution to the trustee by the executor of the estate or the March 1, 1913 value, whichever is greater.

Inasmuch as the taxpayer was in being at the time of his grandmother's death on November 20, 1897, it would appear that the taxpayer's interest in the trust corpus was "acquired" at the time of the formation of the trust. Accordingly, the proper basis in the instant case under section 113 (b) of the Revenue Act of 1928, is the value at the date of distribution to the trustee or the March 1, 1913 value.

Net income is adjusted as follows:

13	Ordinary net income on which deficiency of $3,911.56 was based		$101,161.66
	Add: Loss on sale of securities received from the Mary Van Nest Trust eliminated		5,550.57
	Ordinary net income revised		$106,712.23
	Capital net gain included in previous adjustment		$101,391.43
	Add:		
	Capital net gain on sale of securities received from the Mary Van Nest Trust	$60,053.32	
	Capital net loss previous adjustment	25,092.94	85,146.26
	Capital net gain revised		$186,537.69
	Income subject to surtax		$106,712.23
	Less:		
	Dividends	$175,632.40	
	Interest on Liberty Bonds	271.20	
	Personal exemption and credit for dependents	800.00	176,703.60
	Balance subject to normal tax		None
14	Surtax on $106,712.23		$13,002.45
	Tax at 12½% on capital net gain of $188,537.69		23,317.21
	Total tax		$36,319.66
	Tax paid at source		30.62
	Tax liability		$36,289.04
	Tax previously assessed		24,535.64
	Deficiency		11,753.40

Profit on sale of securities from the Mary Van Nest Trust is determined as follows:

Acquired by trustee	Value reported	March 1, 1913 value or cost to trustee	S. P.
2 AA Third Ave. R. R. 4/60, March 12, 1912	$1,440.00	$1,717.50	$1,015.00
54 U. S. Steel pfd., Sept. 9, 1921	7,830.00	5,889.93	7,625.34
122 Manhattan Ry., Prior to March 1, 1913	7,160.75	15,982.00	4,544.62
15 80 Rensselaer & Saratoga R. R., Prior to March 1, 1913	7,275.00	9,025.00	6,898.00
100 Pittsburgh, Ft. Wayne & Chic. Ry., Prior to March 1, 1913	16,400.00	16,200.00	15,096.00
10 Chic. & E. Ill. Ry. Pfd., Prior to March 1, 1913	762.50	516.14	400.35
405 Glen Alden Coal, Aug. 16, 1921	66,369.38	2,025.00	40,380.30
405 Lackawanna Sec., Sept. 16, 1927	20,067.35	9,846.46	16,616.80
200 Nat'l. City Bank, Prior to March 1, 1913	35,700.00	10,344.00	39,022.44
	$163,004.98	$71,546.03	$131,599.35

Selling price	$131,599.35
Cost or March 1, 1913, value	71,546.03
Profit (Capital net gain)	$60,053.32

Explanation of Changes

In determining the gain or loss based on the value as of May 5, 1928, the date of distribution, an ordinary loss of $5,550.57 and capital net loss of $25,092.94 were determined.

16 Computation of gain or loss based on the cost of the securities to the trustees or March 1, 1913, value, results in a profit of $60,053.32, therefore, the ordinary loss of $5,550.57 is eliminated.

A copy of this letter, together with a copy of the statement and schedules has been mailed to your representative Mr. Ben R. Clark, % Carter Ledyard & Milburn, 2 Wall Street, New York, New York, in accordance with the authority conferred upon him in the power of attorney executed by you and on file with the Bureau.

17 Before United States Board of Tax Appeals

Docket No. 81544

[Same title.]

Answer

The Commissioner of Internal Revenue by his attorney, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revnue, in answer to the petition of the above-named taxpayer, admits and denies as follows:

1, 2, 3. Admits the allegations contained in paragraphs 1, 2, and 3 of the petition.

4. (a), (b). Denies that the Commissioner erred in respect of the matters set forth in subparagraphs (a) and (b) of paragraph 4 of the petition.

5. (a), (b), (c), (d), (e), (f). Denies the allegations contained in subparagraphs (a), (b), (c), (d), (e), and (f) of paragraph 5 of the petition.

6. Denies each and every material allegation of fact contained in the petition not hereinbefore specifically admitted, qualified, or denied.

Wherefore, it is prayed that the taxpayer's appeal be denied.

(Signed) ROBERT H. JACKSON,
Robert H. Jackson,
Assistant General Counsel
for the Bureau of Internal Revenue.

Of Counsel:
WILLIAM E. DAVIS,
STANLEY B. ANDERSON,
Special Attorneys,
Bureau of Internal Revenue.

SBA–eds–10–10–35.

18 Before United States Board of Tax Appeals

Docket No. 81544. Promulgated October 21, 1938

[Same title.]

1. Held, that under section 113 (a) (5) of the Revenue Act of 1928 the basis for determining gain or loss from the sale of securities acquired by a remainderman after the death of the life beneficiary of a testamentary trust is the fair market value of the property when distributed to the taxpayer at the termination of the trust.

2. Held, under the capital gains provisions of section 101 of the Revenue Act of 1928, that the securities in question were not "held by the taxpayer," petitioner remainderman, from the date of the death of the original grantor.

Ben R. Clark, Esq., and Allin H. Pierce, Esq., for the petitioner. W. Frank Gibbs, Esq., for the respondent.

Findings of fact and opinion

This proceeding was brought for a redetermination of a deficiency of $11,753.40 in petitioner's income tax for the calendar year 1930.

The questions presented are (1) the date to be used in fixing the basic valuation of securities which petitioner had received as remainderman of a testamentary trust after the death of
19 the life beneficiary for the purpose of determining taxable gain or loss to petitioner on the sale thereof; and (2) the date to be used for the purpose of determining the period for which these securities were held by petitioner prior to their sale within the meaning of the capital net gains and losses provisions of the applicable statute.[1]

Findings of fact

The facts were stipulated substantially as follows:

Mary Van Nest died a resident of the County of New York, State of New York, on November 20, 1897, leaving a last will and testament which was duly admitted to probate by the Surrogate of the County of New York, letters testamentary being issued to Franklin W. Gilley, Giraud Foster, and Thomas Thacher as executors.

The ninth article of this will reads in part as follows:

"NINTH. All the residue of my estate of every kind I give and devise as follows:

'One half thereof in equal shares to my daughters Mary Van Nest Jackson, Anna Van Nest Gambrill, and Jennie Van Nest Foster, and my granddaughter, Mary Alice Van Nest absolutely.

'The other half thereof in four equal shares to my executors, to hold the same in trust, one share for the benefit of each of the same four persons to wit my said three daughters and my said granddaughter and to receive the income and pay the same to her during her life with full power to invest and reinvest in
20 their discretion without any limitation whatsoever and at her death to transfer and deliver the same as she if leaving issue shall by will direct or in the absence of such direction, to her issue equally, or if she shall leave no issue, then to the survivors of the said four persons to wit my said three daughters and my said granddaughter, and to the issue of any of the said four persons who may have died, the issue to take the share which the parent would have taken if living. * * *'"

The executors proceeded with the administration of the estate and on or about January 4, 1898, they delivered to themselves, as trustees for Anna Van Nest Gambrill, the following securities at the following prices:

375 shares Farmers Loan & Trust Co., par value $25	$76,406.25
300 shares Harlem Railroad Co	48,000.00
100 shares Pittsburgh & Fort Wayne Railroad	16,900.00

[1] Sec. 101, Revenue Act of 1928.

200 shares New York, N. H. & H. R. R. R.	$36,600.00
300 shares Delaware, Lackawanna & Western Railroad	23,250.00
50 shares Rensselaer & Saratoga Railroad	9,250.00
75 shares Chicago & North Western Railroad, preferred	12,225.00
Total	222,631.25

Separate trusts were likewise set up by the trustees for each of other three life beneficiaries named in the will of Mary Van Nest and securities of a value equal to the value of those set forth above in favor of Anna Van Nest Gambrill were delivered by the executors to themselves as trustees for Mary Van Nest Jackson, Jennie Van Nest Foster, and Mary Alice Van Nest.

21 Anna Van Nest Gambrill, mother of petitioner and the life beneficiary of one of the trusts, died on March 23, 1928, without having exercised the power of appointment conferred upon her by the ninth article of the will of Mary Van Nest. Her sole surviving issue was petitioner, Richard Van Nest Gambrill, who was born prior to the death of Mary Van Nest.

Upon the death of Anna Van Nest Gambrill, the trustees of the trust for her benefit under the will of Mary Van Nest proceeded with the settlement of their accounts. One of the matters which had to be settled before the trustees could make distribution of the corpus to the petitioner as remainderman was the question of additional inheritance taxes due to the State of New York from the estate of Mary Van Nest on the remainder interest. In the original appraisal of the estate of Mary Van Nest, filed for the purpose of determining the New York State inheritance tax, the appraiser reported that the value of this remainder interest was not at that time ascertainable, and the collection of the inheritance tax on this remainder interest was therefore held in abeyance under the provisions of section 221, chapter 908, Laws of 1896 of the State of New York. Under this section the tax on the remainder interest would become due and payable when the person or persons beneficially entitled thereto should come into actual possession or enjoyment thereof. The tax was made a lien upon the property transferred, and the law provided that no trustee should be entitled to a final accounting unless he should produce a receipt sealed and countersigned by the Comptroller of the State of New York, or a copy thereof certified by him, unless a bond should have been filed as prescribed by law. On or about the 16th day of April 1928, the

22 trustees by their attorney filed a petition in the Surrogate's Court for the County of New York, asking for an order modifying the original order fixing the New York State inheritance tax on the estate of Mary Van Nest, and on or about May 1, 1928, an order was entered assessing a tax of $2,359.91

upon the value of the remainder interest passing to the petitioner. This tax was paid on or about May 24, 1928.

Other payments made by the trustees prior to the transfer and delivery of the corpus to petitioner included fees for legal services, commissions to the trustees on receiving gain on the corpus of the trust and for paying out the corpus of the trust, payments to the executors of the estate of Anna Van Nest Gambrill for income collected after her death, fees for services in preparing Federal and state income tax returns, and payments to the trustees for commissions on income. Other transactions by the trustees after the death of the life tenant included the sale of $40,000 of New York City 4's of 1936, the sale of which was required in order to raise funds for the payment of the trustees' commissions and for the payment of the New York State inheritance tax on the remainder interests passing to the petitioner.

There was no judicial settlement of the accounts of the trustees, but the trustees accounted by receipt and release, the release being signed on May 22, 1928, by petitioner individually, and by Lewis Cass Ledyard, Jr., and petitioner as executors of the last will and testament of Anna Van Nest Gambrill. The balance of the corpus included in the trust as to which petitioner was remainderman was delivered to petitioner in accordance with the terms of the will of Mary Van Nest, on or about May 5, 1928.

During the calendar year 1930 petitioner sold certain of the securities which had been delivered to him by the trustees. In computing gain or loss from the sale of these securities, petitioner used their fair market value as of May 5, 1928.

23 These securities sold in 1930, together with the proceeds received therefor, the dates of sale, and the fair market value as of May 5, 1928, are as follows:

Securities	Date of sale—1930	Proceeds	May 5, 1928 value
$2,000 Third Avenue Railroad 4/60	Feb. 18	$1,015.00	$1,440.00
54 shares United States Steel preferred	Feb. 18	7,625.34	7,830.00
122 shares Manhattan Railway	Feb. 20	4,544.62	7,100.75
50 shares Rensselaer & Saratoga Railroad	Feb. 19	6,896.00	7,275.00
100 shares Pittsburgh, Fort Wayne & Chicago Railway	Feb. 20	15,096.00	16,400.00
10 shares Chicago & Eastern Illinois Railway preferred	Feb. 21	400.85	762.50
405 shares Glen Alden Coal	May 6	40,380.30	66,369.38
405 shares Lackawanna securities	June 4	16,616.80	20,067.35
200 shares National City Bank	June 9	39,022.44	35,700.00
Total		131,592.35	163,004.98

The March 1, 1913, fair market value of the securities acquired prior to that date, or the cost, whichever is greater, and the cost to the trustees of the securities acquired after March 1, 1913, are as follows:

Securities	Acquired by trustees	March 1, 1913 or cost to trustees
$2,000 Third Avenue Railroad 4/60	Mar. 12, 1912	$1,717.80
54 shares United States Steel preferred	Sept. 9, 1921	5,889.93
122 Shares Manhattan Railway	Prior to Mar. 1, 1913	15,982.00
50 shares Rensselaer & Saratoga Railroad	Prior to Mar. 1, 1913	9,025.00
100 shares Pittsburgh, Fort Wayne & Chicago Railway	Prior to Mar. 1, 1913	16,200.00
10 shares Chicago & Eastern Illinois Railway preferred	Prior to Mar. 1, 1913	516.14
405 shares Glen Alden Coal	Aug. 16, 1921	2,025.00
405 shares Lackawanna securities	Sept. 16, 1927	9,846.46
200 shares National City Bank	Prior to Mar. 1, 1913	10,344.00
Total		71,546.03

The fair market values of these securities as of March 23, 1928, the date of death of the life beneficiary, Anna Van Nest Gambrill, are as follows:

Securities	Adjusted value Mar. 23, 1928
$2,000 Third Avenue Railroad 4/60	$1,380.00
54 shares United States Steel, preferred	7,830.00
25 122 shares Manhattan Railway	5,154.50
50 shares Rensselaer & Saratoga Railroad	7,225.00
100 shares Pittsburgh, Fort Wayne & Chicago Railway	16,500.00
10 shares Chicago & Eastern Illinois Railway, preferred	700.00
405 shares Glen Alden Coal	62,471.25
405 shares Lackawanna securities	19,398.46
200 shares National City Bank	31,400.00
Total	152,059.21

In determining the period for which petitioner had held these securities, under the provisions of section 101 of the Revenue Act of 1928, petitioner used the date May 5, 1928, whereas respondent has determined that the period held should be computed from November 20, 1897, the date of the death of Mary Van Nest, in the case of securities owned by her at the time of her death, and from the dates of purchase in the case of securities subsequently purchased by the trustees.

Opinion

VAN FOSSAN. The first of two major questions presented by the case at bar is the date to be used for the purpose of fixing the basic valuation in determining the gain or loss to petitioner on the sale of securities which he received as remainderman of a testamentary trust after the death of the life beneficiary.

The second question is the date to be used in determining
26 the period for which these same securities were held by petitioner prior to their sale, within the meaning of the capital gains provisions of the applicable revenue act.[2]

[2] Sec. 101, Revenue Act of 1928.

The securities which petitioner received as remainderman, after the death of the life beneficiary, are capable of being divided into two categories, the first being those securities which had come to the trustees as part of the trust res, and the second being those securities which were purchased by the trustees with trust funds, subsequent to March 1, 1913, and held by them until delivery to petitioner in 1928.

The statutory provisions governing the basis for the determination of gain or loss are found in section 113 of the Revenue Act of 1928 and those here pertinent are as follows:

"(a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * *

'(5) Property transmitted at death.—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons, entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death;'

27

* * * * *

"(b) Property acquired before March 1, 1913.—The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, shall be:

'(1) the cost of such property (or, in the case of such property as is described in subsection (a) (1), (4), (5), or (12) of this section, the basis as therein provided), or

'(2) the fair market value of such property as of March 1, 1913,'

"whichever is greater. In determining the fair market value of stock in a corporation as of March 1, 1913, due regard shall be given to the fair market value of the assets of the corporation as of that date."

As to the first above indicated issue, respondent urges that petitioner's interest under the testamentary trust was a
28 vested interest under the controlling law of New York (as to the securities which were a part of the original trust res); that where property is bequeathed in trust, distribution by the executor of the donee's estate to the trustee constitutes the "distribution to the taxpayer" contemplated by the staiute (as to the securities which were acquired by the trustees with trust funds); that where trustees purchase property with trust funds, and later distribute the property so acquired to the taxpayer, such property is not "acquired by will or intestacy" within the meaning of the above quoted statute.

Even though petitioner's interest under New York law may be a vested interest acquired at the date of testator's death, which was prior to March 1, 1913, and as such brings the matter within the purview of section 113 (b), that section, by its terms, makes section 113 (a) (5) controlling. The date of acquisition therefore is removed from the picture and the date for determining gain or loss is the date prescribed by section 113 (a) (5). Counsel are agreed that the applicable provision of the subsection is the provision covering "all other cases" and that the basis therefore is "the fair market value of the property at the time of the distribution to the taxpayer."

Respondent concedes that Ralph W. Harbison, 26 B. T. A. 896,[3] Mary Colgate, 27 B. T. A. 506,[4] Margaret E. B. Fleming, 36 B. T. A. 773, are all contrary to the position he takes on the first issue. These cases, together with Van Nostrand v. United States, 18 Fed. Supp. 295, affd., 94 Fed. (2d) 510,
29 hold that the phrase "time of distribution to the taxpayer" as used in the statute, means the time when this property was actually delivered to or made available for the use of the taxpayer.

However, respondent cites Jenkins v. Smith (U. S. Dist. Ct., Dist. Conn.), 21 Fed. Supp. 433, as squarely supporting his contentions, and urges that this Board reconsider the entire issue on the basis of the Jenkins case and the arguments presented in the brief in the case at bar.

After a careful consideration of respondent's arguments and with due deference to the District Court for the District of Connecticut, we are constrained to adhere to our original position. Nothing is presented which would justify our recantation. We, therefore, hold that the basis to petitioner for the purpose of determining gain or loss on the sale of the securities in question

[3] Reversed on another issue, 68 Fed. (2d) 1004; 293 U. S. 144.
[4] Reversed on another issue, mandate C. C. A., 2d Cir., on stipulation to abide by decision in Elias v. Commissioner, 68 Fed. (2d) 890; 293 U. S. 144

is the fair market value of such securities on May 5, 1928, the date when the corpus of the trust was delivered to petitioner. This was the time of the "distribution to the taxpayer." Cf. Robert A. Taft, Trustee, 34 B. T. A. 603; Bessie C. Williamson, 34 B. T. A. 924.

Respondent urges that the second issue, being concerned with the capital gains provisions of the statute, is not dependent upon the date used under section 113 for determining the basis for gain or loss and that the securities here involved have been held by petitioner, within the meaning of section 101 of the Revenue Act of 1928, since the respective dates on which they were acquired by the trust estate. In other words, that those securities which were a part of the original trust res were "held by the taxpayer" since the death of the testator, and those securities which were acquired by the trustee with trust funds were "held by the taxpayer" since the time of their purchase.

Respondent relies on McFeely v. Commissioner, 296 U. S. 102, which case directly severs any dependence of section 101 on section 113 for the determination of the holding period.

In addressing itself to the question presented in the McFeely case the Supreme Court, through Justice Roberts, declared that "held" and "acquired" were in effect synonymous, and stated: "* * * In common understanding, to hold property is to own it. In order to own or hold, one must acquire. The date of acquisition is, then, that from which to compute the duration of ownership or length of holding. Whether under local law title to personal property passes from a decedent to the legatee or, next of kin at death subject to a withholding of possession for purposes of administration, or passes to the personal representative for the purposes of administration—the title of the beneficiary, though derived through the executor, relating back to the date of death—is for the present purposes immaterial. In either case, the date of acquisition, within the intent of the Revenue Act is the date of death." [Citing Brewster v. Gage, 280 U. S. 327.]

To determine the application of the McFeely case to the case at bar, it is necessary to consider the particular questions involved in the two cases. The McFeely case, which is really a consolidation of five cases, is concerned with the administration period between the date of death of the original holder and the date of actual acquisition by the respective taxpayers, and involves, respectively, residuary legatees, the donee of a widow who elected to take against her husband's will, and one taking under intestate laws. The Court states the question "whether property acquired from a decedent through intestacy, or

31 a general bequest, is, within the meaning of the clause [held by the taxpayer for more than two years] held by the taxpayer from the date of decedent's death or from the date of distribution." The case at bar is concerned with the date of acquisition of a remainderman's interest in a trust estate after the death of the life beneficiary. This, we think, presents a distinctly different problem, one not ruled on in the cited case. For this reason we do not deem the McFeely case controlling here.

As above noted, respondent contends that the securities which were originally a part of the trust estate were "held by the taxpayer" from the date of the death of the original grantor (1897), and those purchased with trust funds were held from the date of such purpose. This contention was based on McFeely v. Commissioner, supra, which, as above indicated, we have rejected as controlling in the case at bar.

Petitioner urges that the controlling date is May 5, 1928, the date of delivery of the trust corpus to petitioner. Whether this date or that of March 23, 1928, the date of death of the life beneficiary, is the determinative date it is not necessary in this case to decide. The result is the same whichever be taken. The findings of fact establish that certain securities were sold prior to March 23, 1930, and that others were sold after May 5, 1930. None were sold in the interval between the two dates.

We hold that those securities sold in February 1930 had not been held by the taxpayer for more than two years and were, therefore, not capital assets, while those sold on May 6 and in June 1930 had been held by taxpayer for more than two years and were, therefore, capital assets.

Decision will be entered under Rule 50.

[SEAL]

32 Before United States Board of Tax Appeals,
Washington

Docket No. 81544

[Same title.]

Decision

Pursuant to the Findings of Fact and Opinion of the Board promulgated October 21, 1938, the respondent herein having on November 14, 1938, filed a recomputation and the petitioner having on November 23, 1938, filed an acquiescence therein, now therefore, it is ordered and decided: That there is an overpayment in income tax for the year 1930 in the amount of $75.60, which amount was paid within two years of the filing of the petition

in accordance with the provisions of Section 809 (c), Revenue Act of 1938.

[SEAL] (S) ERNEST H. VAN FOSSAN, *Member.*

Enter.

Entered November 30, 1938.

33 In United States Circuit Court of Appeals for the Second Circuit

B. T. A. Docket No. 81544

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER ON REVIEW

vs.

RICHARD VAN NEST GAMBRILL, RESPONDENT ON REVIEW

Petition for review and assignments of error

Now comes the Commissioner of Internal Revenue, by his attorneys, James W. Morris, Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and John M. Morawski, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I

JURISDICTION

The petitioner on review (hereinafter referred to as the Commissioner) is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States.

The respondent on review, Richard Van Nest Gambrill (hereinafter referred to as the taxpayer), is an individual
34 with his residence at Peapack, New Jersey. His individual income tax return for the year 1930 was filed with the Collector of Internal Revenue for the Second District of New York, whose office is located at New York, N. Y., and within the judicial circuit of the United States Circuit Court of Appeals for the Second Circuit.

The Commissioner files this petition pursuant to the provisions of Sections 1001, 1002, and 1003 of the Revenue Act of 1926, as amended by Section 603 of the Revenue Act of 1928, as amended by Section 1101 of the Revenue Act of 1932, as amended by Section 519 of the Revenue Act of 1934.

II

PRIOR PROCEEDINGS

On June 18, 1935, the Commissioner determined a deficiency in income tax against the taxpayer for the year 1930 in the amount of $11,753.40, and sent by registered mail a notice of said deficiency in accordance with the provisions of Section 272 of the Revenue Act of 1928, as amended by Section 501 of the Revenue Act of 1934. Thereafter, and on Sept. 14, 1935, the taxpayer filed an appeal from the said determination of the Commissioner with the United States Board of Tax Appeals.

The case was tried before the United States Board of Tax Appeals on May 4, 1938.

On October 21, 1938, the Board promulgated its findings of fact and opinion and on November 30, 1938, entered its decision, wherein it was ordered and decided that there is an overpayment in income tax for the year 1930 in the amount of $75.60.

35

III

NATURE OF CONTROVERSY

The questions presented to the Board were: (1) The date to be used in fixing the basic valuation of securities which taxpayer had received as remainderman of a testamentary trust after death of the life benficiary for the purpose of determining taxable gain or loss to taxpayer on the sale thereof; and (2) the date to be used for the purpose of determining the period for which these securities were held by taxpayer prior to their sale within the meaning of the capital net gains and losses provisions of the statute (Section 101 of the Revenue Act of 1928).

The taxpayer was remainderman of a testamentary trust under the will of his grandmother, who died in 1897. The life beneficiary, the taxpayer's mother, died on March 23, 1928, and on May 5, 1928, certain securities constituting the corpus of the trust were delivered to the taxpayer by the trustees in accordance with the terms of the testator's will. The securities thus received by taxpayer as remainderman may be divided into two categories, the first being those securities which had come to the trustees as a part of the trust *res* and the second being those securities which were purchased by the trustees with trust funds subsequent to March 1, 1913, and held by them until delivery to the taxpayer at the termination of the trust in 1928. Some of the securities were sold by the taxpayer in February 1930 and other securities were sold on May 6 and in June 1930. In

computing the gain or loss from the sale of these securities, taxpayer used their fair market value as of May 5, 1928, taking that date to be the "time of the distribution to the taxpayer," within the meaning of Section 113 (a) (5) of the Revenue Act of 1928. The Commissioner urged that as to the se-
36 curities which were a part of the original trust *res* the distribution by the executors of the testatrix's estate to the trustees constituted the "distribuion to the taxpayer" contemplated by the statute, and argued further (with respect to thos securities which were acquired by the trustees with trust fun , that where trustees purchase property with trust funds and later distribute the property so acquired to the taxpayer, such property is not "acquired by will or intestacy" within the meaning of Section 113 (a) (5). The Board held that the provisions of Section 113 (a) (5) are controlling herein and that the taxpayer was entitled to use as the basis for determining gain "the fair market value of the property at the time of the distribution to the taxpayer." It was further held that the phrase "at the time of the distribu'ion to taxpayer," as used in the statute, means the time when this property was actually delivered to or made available for the use of the taxpayer. Applying this ruling to the facts hereinabove set out, the Board found that the time of the distribution to the taxpayer in the instant case was May 5, 1928, the date when the corpus of the trust was delivered to the taxpayer.

The Commissioner determined that the securities sold by the taxpayer in 1930 were "held by the taxpayer," within the meaning of Section 101 of the Revenue Act of 1928, from the respective dates they were acquired by the trust estate and therefore having been held for more than two years, were capital assets. The taxpayer took as the controlling date May 5, 1928, the date of delivery of the trust corpus to the taxpayer. The Board held that it was unnecessary to decide whether the determinative date was May 5, 1928 (date of distribution) or March 23, 1928, the date of death of the life beneficiary, for the reason that the re-
sult in this case is the same whichever be taken. The
37 Board held that those securities sold in February 1930 had not been held by the taxpayer for more than two years and were therefore not capital assets while those sold on May 6 and in June 1930 had been held by taxpayer for more than two years and were therefore capital assets.

IV

ASSIGNMENTS OF ERROR

The Commissioner avers that in the record and proceeding before the Board of Tax Appeals and in the opinion and final

decision rendered and entered by the Board of Tax Appeals, manifest error occurred and intervened to the prejudice of the Commissioner who now assigns the following errors and each of them, which he avers occurred in said record, proceeding, opinion and final decision so rendered and entered by the Board of Tax Appeals:

1. The Board of Tax Appeals erred in holding and deciding that there is an overpayment in income tax for the year 1930 in the amount of $75.60.

2. The Board of Tax Appeals erred in failing to hold and decide that there is a deficiency in income tax for the year 1930 in the amount of $11,753.40.

3. The Board of Tax Appeals erred in holding and deciding that the phrase "the time of distribution to the taxpayer," as used in the statute, means the time when this property was actually delivered to or made available for the use of the taxpayer.

4. The Board of Tax Appeals erred in holding and deciding
38 that the basis to taxpayer for the purpose of determining a gain or loss on the sale of the securities in question is the fair market value of such securities on May 5, 1928, the date when the corpus of the trust was delivered to taxpayer, and that this was the time of the "distribution to the taxpayer."

5. The Board of Tax Appeals erred in failing to hold and decide as to the securities which were a part of the original trust *res* that the distribution by the executors of the testatrix's estate to the trustees constituted the "distribution to the taxpayer," contemplated by the statute.

6. The Board of Tax Appeals erred in failing to hold and decide as to the securities which were acquired by the trustees with trust funds that such property is not "acquired by will or intestacy" within the meaning of Section 113 (a) (5) of the Revenue Act of 1928 and hence take as their basic cost to the trustees.

7. The Board of Tax Appeals erred in holding and deciding that those securities sold in February 1930, had not been held by the taxpayer for more than two years and were therefore not capital assets.

8. The Board of Tax Appeals erred in failing to hold and decide that the securities sold by the taxpayer in 1930 were "held by the taxpayer," within the meaning of Section 101 of the Revenue Act of 1928, from the respective dates they were acquired by the trust estate and therefore having been held for more than two years, were capital assets.

9. The Board of Tax Appeals erred in that its decision is not supported by the evidence and is contrary to law.

Wherefore, the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Second Circuit, that a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

(Signed) JAMES W. MORRIS,
Assistant Attorney General,
(Signed) J. P. WENCHEL
R. L. W.
(Signed) J. P. WENCHEL,
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
JOHN M. MORAWSKI,
Special Attorney,
Bureau of Internal Revenue.

[*Duly sworn to by John M. Morawski; jurat omitted in printing.*]

In United States Circuit Court of Appeals for the Second Circuit

B. T. A. Docket No. 81544

[Same title.]

Notice of filing petition for review

To BEN R. CLARK, Esq., and ALLIN H. PIERCE, Esq.,
2 Wall Street, New York, N. Y.

You are hereby notified that the Commissioner of Internal Revenue did, on the 8th day of February 1939, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 8th day of February 1939.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors

mentioned therein, is hereby acknowledged this 9th day of February 1939.

(Signed) BEN R. CLARK,
(Signed) ALLIN H. PIERCE,
Attorneys for Respondent on Review.

(Signed) J. P. WENCHEL,
R. L. W.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

42 In United States Circuit Court of Appeals for the Second Circuit

B. T. A. Docket No. 81544

[Same title.]

Notice of filing petition for review

To Mr. RICHARD VAN NEST GAMBRILL,
Peapack, New Jersey.

You are hereby notified that the Commissioner of Internal Revenue did, on the 8th day of February 1939, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 8th day of February 1939.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 10 day of March, 1939.

(Signed) RICHARD V. N. GAMBRILL,
Respondent on Review.

(Signed) J. P. WENCHEL,
R. L. W.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

43 Before the United States Board of Tax Appeals

Docket No. 81544

RICHARD VAN NEST GAMBRILL, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Stipulation of facts

It is hereby stipulated and agreed by and between the parties hereto acting by their respective counsel that for the purposes of the trial of this proceeding, or any hearing or rehearing with respect thereto, or any appeal therefrom or review thereof, the following facts shall be deemed to be proven without the submission of any proof other than this stipulation, without prejudice, however, to the right of either party to object to the materiality of any fact:

First. Mary Van Nest died a resident of the County of New York, State of New York, on the 20th day of November 1897, leaving a last will and testament which was duly admitted to probate by the Surrogate of the County of New York, letters testamentary being issued to Franklin W. Gilley, Giraud Foster and Thomas Thacher as executors.

The ninth article of this will reads in part as follows:

"NINTH. All the residue of my estate of every kind I give and devise as follows:

"'One half thereof in equal shares to my daughters Mary Van Nest Jackson, Anna Van Nest Gambrill, and Jennie Van Nest Foster, and my granddaughter, Mary Alice Van Nest absolutely.

44 "'The other half thereof in four equal shares to my executors, to hold the same in trust, one share for the benefit of each of the same four persons to wit my said three daughters and my said granddaughter and to receive the income and pay the same to her during her life with full power to invest and reinvest in their discretion without any limitation whatsoever and at her death to transfer and deliver the same as she if leaving issue shall by will direct or in the absence of such direction, to her issue equally, or if she shall leave no issue, then to the survivors of the said four persons to wit my said three daughters and my said granddaughter, and to the issue of any of the said four persons who may have died, the issue to take the share which the parent would have taken if living. * * *'"

Second. The executors above named proceeded with the administration of the estate and on or about the 4th day of January 1898, they delivered to themselves as trustees for Anna Van Nest Gambrill, the following securities at the following prices:

375 shs. Farmers Loan & Trust Co. par value $25	$76,406.25
300 shs. Harlem Railroad Co.	48,000.00
100 shs. Pittsburgh & Fort Wayne Railroad	16,900.00
200 shs. New York, N. H. & H. R. R. R.	36,600.00
300 shs. Delaware, Lackawanna & Western Railroad	23,250.00
50 shs. Rensselaer & Saratoga Railroad	9,250.00
75 shs. Chicago & North Western Railroad, preferred	12,225.00
Total	$222,631.25

45 Separate trusts were likewise set up by the trustees for each of the other three life beneficiaries named in the will of Mary Van Nest and securities of equal value as those set forth above in favor of Anna Van Nest Gambrill were delivered by the executors to themselves as trustees for Mary Van Nest Jackson, Jennie Van Nest Foster, and Mary Alice Van Nest.

Third. Anna Van Nest Gambrill, mother of petitioner and the life beneficiary of one of the aforesaid trusts, died on March 23, 1928, without having exercised the power of appointment conferred upon her by the ninth article of the will of Mary Van Nest. Her sole issue her surviving was the petitioner, Richard Van Nest Gambrill, who was born prior to the death of Mary Van Nest.

Fourth. Upon the death of said Anna Van Nest Gambrill, the trustees of the trust for her benefit under the will of Mary Van Nest proceeded with the settlement of their accounts. One of the matters which had to be settled before the trustees could make distribution of the corpus to the petitioner as remainderman was the question of additional inheritance taxes due to the State of New York from the estate of Mary Van Nest on the said remainder interest. In the original appraisal of the estate of Mary Van Nest, filed for the purpose of determining the New York State inheritance tax, the appraiser reported that the value of this remainder interest was not at that time ascertainable and the collection of the inheritance tax on this remainder interest was therefore held in abeyance under the provisions of Section 221, Chapter 908, laws of 1896 of the State of New York. Under this section the tax on the said remainder interest would become due and payable when the person or persons beneficially entitled thereto should come into actual possession or enjoyment thereof. The tax was made a lien upon the property
46 transferred and the law provided that no trustee should

be entitled to a final accounting unless he should produce a receipt sealed and countersigned by the Comptroller of the State of New York, or a copy thereof certified by him unless a bond should have been filed as prescribed by law. On or about the 16th day of April 1928, the trustees by their attorney filed a petition in the Surrogate's Court for the County of New York, asking for an order modifying the original order fixing the New York State inheritance tax on the estate of Mary Van Nest, and on or about the 1st day of May 1928, an order was entered assessing a tax of $2,359.91 upon the value of the remainder interest passing to the petitioner. This tax was paid on or about the 24th day of May 1928.

Fifth. Other payments made by the trustees prior to the transfer and delivery of the corpus to the petitioner included fees for legal services, commissions to the trustees on receiving gain on the corpus of the trust and for paying out the corpus of the trust, payments to the executors of the estate of Anna Van Nest Gambrill for income collected after her death, fees for services in preparing Federal and State income tax returns and payments to the trustees for commissions on income. Other transactions by the trustees after the death of the life tenant included the sale of $40,000. New York City 4's of 1936, the sale of which was required in order to raise funds for the payment of the trustees' commissions and for the payment of the New York State inheritance tax on the remainder interests passing to the petitioner.

Sixth. There was no judicial settlement of the accounts of the trustees, but the trustees accounted by receipt and release, the release being signed on May 22, 1928, by the petitioner individually, and by Lewis Cass Ledyard, Jr., and the petitioner as executors of the last will and testament of Anna Van Nest Gambrill. The balance of the corpus included in the trust as
47 to which this petitioner was remainderman was delivered to the petitioner in accordance with the terms of the will of Mary Van Nest on or about May 5, 1928.

Seventh. During the calendar year 1930, the petitioner sold certain of the securities so delivered to him by the said trustees. In computing gain or loss from the sale of these securities, the petitioner used their fair market value as of May 5, 1928. These securities sold in 1930, together with the proceeds received there-

for, the dates of sale and the fair market value as of May 5, 1928, are as follows:

Name of securities	Date of sale 1930	Proceeds	May 5, 1928 value
$2,000 Third Avenue Railroad 4/60	Feb. 18	$1,015.00	$1,440.00
54 shs. United States Steel; preferred	Feb. 18	7,625.34	7,830.00
122 shs. Manhattan Railway	Feb. 20	4,544.62	7,160.75
50 shs. Rensselaer & Saratoga Railroad	Feb. 19	6,898.00	7,275.00
100 shs. Pittsburgh, Fort Wayne & Chicago Railway	Feb. 20	15,096.00	16,400.00
10 shs. Chicago & Eastern Illinois Railway, preferred	Feb. 21	400.85	762.50
405 shs. Glen Alden Coal	May 6	40,380.30	66,369.38
405 shs. Lackawanna securities	June 4	16,616.80	20,067.35
200 shs. National City Bank	June 9	39,022.44	36,700.00
Total		$131,599.35	$163,004.98

48 Eighth. The March 1, 1913, fair market value of the securities acquired prior to that date, or the cost, whichever is greater, and the cost to the trustees of the securities acquired after March 1, 1913, are as follows:

Name of securities	Acquired by trustees	March 1, 1913 or cost to trustees
$2,000 Third Avenue Railroad 4/60	March 12, 1912	$1,717.50
54 shs. United States Steel, preferred	Sept. 9, 1921	5,889.93
122 shs. Manhattan Railway	Prior to March 1, 1913	15,922.00
50 shs. Rensselaer & Saratoga Railroad	Prior to March 1, 1913	9,925.00
100 shs. Pittsburgh Fort Wayne & Chicago Railway	Prior to March 1, 1913	16,200.00
10 shs. Chicago & Eastern Illinois Railway, preferred	Prior to March 1, 1913	516.14
405 shs. Glen Alden Coal	August 16, 1921	2,025.00
405 shs. Lackawanna securities	Sept. 16, 1927	9,846.46
200 shs. National City Bank	Prior to March 1, 1913	10,344.00
Total		$71,546.03

Ninth. The fair market values of these securities as of March 23, 1928, the date of the death of the life beneficiary Anna Van Nest Gambrill are as follows:

49

Name of securities	Adjusted value March 23, 1928
$2,000 Third Avenue Railroad 4/60	$1,380.00
54 shs. United States Steel, preferred	7,830.00
122 shs. Manhattan Railway	5,154.50
50 shs. Rensselaer & Saratoga Railroad	7,225.00
100 shs. Pittsburgh, Fort Wayne & Chicago Railway	16,500.00
10 shs. Chicago & Eastern Illinois Railway, preferred	700.00
405 shs. Glen Alden Coal	62,471.25
405 shs. Lackawanna securities	19,398.46
200 shs. National City Bank	31,400.00
Total	$152,059.21

Tenth. In determining the period for which the petitioner had held these securities, under the provisions of Section 101 of the Revenue Act of 1928, the petitioner used the date May 5, 1928,

whereas the respondent has determined that the period held should be computed from the 20th day of November 1897, the date of the death of Mary Van Nest in the case of securities owned by her at the time of her death and from the dates of purchase in the case of securities subsequently purchased by the trustees.

(Signed) BEN R. CLARK,
Ben R. Clark,
Counsel for Petitioner,
Office & Post Office Address,
2 Wall Street, New York, New York.
(Signed) J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

50 In United States Circuit Court of Appeals for the Second Circuit

B. T. A. Docket No. 81544

Praecipe for record

To the CLERK OF THE UNITED STATES BOARD OF TAX APPEALS:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Second Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Second Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries.
2. Pleadings:
   (a) Petition.
   (b) Answer to Petition.

51 3. Findings of Fact and Opinion promulgated October 21, 1938.
4. Decision entered November 30, 1938.
5. Petition for Review.
6. Notices of Filing Petition for Review.
7. Stipulation of Facts.
8. Praecipe for Record.

Service of a copy of the within praecipe is hereby admitted this 23 day of February 1939.

(Signed) BEN R. CLARK,
(Signed) ALLIN H. PIERCE,
Attorneys for Respondent on Review.
(Signed) J. P. WENCHEL,
R. L. W.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

52 [Clerk's certificate to foregoing transcript omitted in printing.]

53 In United States Circit Court of Appeals for the Second Circuit

Nos. 41-257-258-259—October Term 1939

(Argued Febrary 15, 1940. Decided June 10, 1940)

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

RICHARD VAN NEST GAMBRILL, RESPONDENT

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

MARJORIE K. CAMPBELL, RESPONDENT

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

SEYMOUR H. KNOX, RESPONDENT

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

DOROTHY K. G. ROGERS, RESPONDENT

54 Petitions by the Commissioner of Internal Revenue to review determinations of the United States Board of Tax Appeals in respect to income taxes of the respondents Gambrill and Knox for the year 1930, and of the respondents Campbell and Rogers for the year 1933. Affirmed.

Before SWAN, AUGUSTUS N. HAND, and PATTERSON, Circuit Judges.

Sewall Key, Acting Assistant Attorney General, J. L. Monarch and Newton K. Fox, Special Assistants to the Attorney General, Counsel for the Commissioner of Internal Revenue in the proceeding against the respondent Gambrill. Samuel O. Clark, Assistant Attorney General, Sewall Key and Arthur A. Armstrong, Special Assistants to the Attorney General, Counsel for the Commissioner of Internal Revenue in the proceedings against the respondents Campbell, Knox, and Rogers. Sidney W. Davidson, Ben R. Clark, and Allin H. Pierce, Counsel for the respondent Gambrill. James McCormick Mitchell, John L. Kenefick, and Ralph M. Andrews, Counsel for the respondents Campbell, Knox, and Rogers.

55 Opinion

AUGUSTUS N. HAND, Circuit Judge:

The foregoing proceedings all involve the correctness of income tax assessments by the Commissioner of Internal Revenue and in each the Commissioner has appealed from decisions of the Board of Tax Appeals modifying his assessments.

In the Gambrill case the Commissioner assessed an income tax deficiency of $11,753.40 for the year 1930, while the Board of Tax Appeals determined that there was an overpayment of $75.60 by the taxpayer. In the Knox case the Commissioner assessed a deficiency for the same year of $35,645.83 while the Board determined that there was a deficiency of $42,842 (arising, however, from adjustments not here in issue). In the Campbell case the Commissioner assessed an income tax deficiency of $86,937.47 for the year 1933, and in the Rogers case a deficiency of $65,549.60 for the same year. The Board found that there was no income tax deficiency on the part of either Campbell or Rogers. We think that its orders in all four proceedings should be affirmed.

In each of the above cases the taxpayer involved was given a remainder interest in a trust created by will. Certain personal securities that were a part of the corpus of the particular trust were delivered by the trustee to the taxpayer after the right to possession became fixed by the termination of the prior beneficial estate. Some of these securities were acquired by the testator during his lifetime, some of them were purchased by the executor after the testator's death before setting up the trust, and some were purchased by the trustee after the trust was established. Securities derived by the trustee in the various ways mentioned

were delivered by him to the taxpayer and sold by the latter.

56 In assessing income taxes upon alleged profits realized by the taxpayer the Commissioner used the following bases for computing gains: In the case of securities which had been owned by the decedent, their fair market value at the time when distributed by the executor to the trustee; in the case of securities purchased by the executor or trustee, the cost to such fiduciary; in respect to certain securities purchased by a fiduciary prior to March 1, 1913, as in Gambrill's case, the value on that date, whenever cost was unknown. The Board of Tax Appeals, however, took the view that, because of the provisions of Section 113 (a) (5) of the Revenue Acts of 1928 and 1932, the proper basis in all cases was the fair market value of the securities at the "time of the distribution to the taxpayer" by the trustee, no matter when or how the trustee or the executor might have derived the particular securities.

In determining how long a taxpayer had held securities for the purpose of computing capital gain or loss under Section 101 of the Revenue Act of 1928 the Board used the dates of delivery of the securities by the trustee to the taxpayer. The Commissioner, on the other hand, used the date of the death of the testator as the beginning of the period of holding securities owned by the latter and the date of purchase by the fiduciary as the beginning in cases where securities were purchased by the executor or trustee.

We agree with the conclusion of the Board that Sections 113 (a) (5) of the Revenue Acts of 1928 and 1932 govern the computation of loss or gain in the cases before us. The pertinent provisions read as follows:

"(a) Property acquired after February 28, 1913.—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * * * *

57 "(5) Property Transmitted at Death.—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the tax-

payer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death; * * *"

None of the securities involved in the cases before us were acquired "by specific bequest" or were "acquired by the decedent's estate from the decedent." They were all directly acquired from testamentary trustees. Accordingly the basis was not "the fair market value of the property at the time of the death of the decedent." Therefore the third clause of Section 113 (a) (5) which embraces "all other cases" of property acquired by will is controlling. That clause provides that: "In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer."

58 The words "the property" in the foregoing sentence seem inevitably to relate to the particular property sold by the taxpayer to whom it was distributed by the trustee. The term "taxpayer" is defined by Section 701 (a) (13) of the Revenue Acts of 1928 and 1932 as "any person subject to a tax imposed by this Act." It is hard to imagine language which would more clearly fix the basis for computing the gain or loss realized upon the sales of the securities with which the Commissioner had to deal than the words "fair market value of the property at the time of the distribution to the taxpayer."

Perhaps the most strenuous objection made by the Commissioner to adopting what seems to be the clear meaning of the statute is that increment in value between the date of the decedent's death and the time of distribution to the taxpayer is not subjected to taxation when the securities are sold and thus tax resources are impaired. But it is frequently true that increments are not subjected to taxation. One common case where increment in value is disregarded is that which occurs during the lifetime of an owner of securities which are not sold by him but are sold after his death by his executors, administrators, trustees, or remaindermen under his will. Such an increment accruing during the lifetime of the owner of securities has never been taken into account in computing gain or loss upon sales after his death. Increment between the date of death of the owner of securities and the date of distribution by an executor to a legatee is also to be disregarded under the third clause of Section 113 (a) (5) in the case of dis-

tribution of securities which are transmitted by virtue of a general bequest.

The supposed loss in revenue due to a disregard of fluctuations in the market value of securities between the date of death
59 and the time of distribution is moreover somewhat fanciful, for in all cases where the property depreciates in value between the date of death and the date of distribution a larger tax would result from fixing the basic value at "the time of the distribution to the taxpayer" than from fixing the basis at the time of the testator' death.

The further contention of the Commissioner that the word "taxpayer" as used in the third clause of Section 113 (a) (5) should be construed as meaning the "trustee" and that the phrase "time of the distribution to the taxpayer" ought to be interpreted as meaning "the date when the executors transferred the property to the trustees," seems to us without warrant. The taxpayers here are undoubtedly the respondents. The trustees are separate entities and as such are neither agents of the respondents nor mere passive fiduciaries. It is true that under certain circumstances they might themselves have become taxpayers in respect to the corpus of their trusts, but only in case they had made sales of some of the securities composing the corpus—not, as here, when without making any sales they wound up their trusts and distributed the corpus to remaindermen. To treat the trustee and beneficiary remainderman, as the Commissioner wishes us to do, as a "sort of dual tax personality" is to disregard the plain language of the statute and to adopt a concept which seems to us to defy analysis. In view of the clear terms of the third clause of Section 113 (a) (5) it can make no difference whether the interest of any remaindermen be vested, vested subject to be divested, or contingent. In either event the basis should be "the fair market value at the time of the distribution to the taxpayer," i. e., to the respondent whose income taxes are being reviewed, and not to the trustee.

In respect to the securities purchased either by the executors or trustees the Commissioner says they do not come within the third clause of Section 113 (a) (5) because they were not acquired
60 by will. This requires a most technical interpretation of the clause and one that in our opinion is not sound even technically. Any property distributed by a trustee which is part of the corpus of the trust is acquired through and by virtue of the will. Through the will the remaindermen derived all their interest and without it they would have had no standing and would have received nothing. Lyeth v. Hoey, 305 U. S. 188, 194–195.

It is further argued that the Senate Report in respect to the enactment of Section 113 (a) (5) in the 1928 Act justified the Commissioner's interpretation of the statute. In dealing with the

third clause the report said: "It would also apply in cases where the executor purchases property and distributes it to the beneficiary." There is, however, no reason because of this mention of purchases by the executor for limiting the application of the report to property so purchased. In cases where a trust has been created by will the executor will often act as trustee before the trust is actually set up and sometimes will sell and purchase securities on behalf of the trust. Indeed the statement in the Senate Report would not cover the particular facts before us except in situations where the executor so acted.

The Commissioner apparently contends that the decision in Brewster v. Gage, 280 U. S. 327, fi. ing the date of death as the time when property should be valued under the provisions of the Revenue Act of 1921, for the purposes of computing gain or loss, affords some guide in interpreting Section 113 (a) (5). The difficulty in maintaining such a contention is that Section 113 (a) (5) is specific, that it fixes a different date for valuing acquisitions of property from that of the Act of 1921, and that the opinion in Brewster v. Gage says at page 337: "The deliberate selection of language so differing from that used in the earlier acts indicates that a change of law was intended."

In United States v. Nostrand, 94 F. (2d) 510, and Commis-
61 sioner v. Libbey, 100 F. (2d) 458, the Court of Appeals of the First Circuit held that the basis for computing gain or loss to the taxpayer was the market value of the property at the time of distribution by the trustee to the remaindermen, and not the value at the time of distribution by the executor to the trustees. These decisions, rather than that of the Seventh Circuit in Commissioner v. Maguire rendered on March 5, 1940, are in accord with our view.

The second question is whether the securities passing to the respondents Gambrill and Knox were held by them for more than two years and hence whether any gain or loss realized by the sale was taxable not as ordinary income or loss but as a capital gain or loss because the securities were "capital assets" as defined in Section 101 (c) (8) and (B) of the Revenue Act of 1928. The Board held that they were not, and they plainly were not unless the period during which they were held by the trustees can be added to the period between the date of distribution to the taxpayers and the date of sale. There cannot be any such tacking because the property, when held by the respective respondents, did not have "for the purpose of determining gain or loss from a sale * * *, the same basis * * * in his hands as it would have in the hands" of the trustees.

On behalf of the Commissioner it is argued that the decision of the Supreme Court in McFeeley v. Commissioner, 296 U. S.

102, requires us to find that the securities had been held from the date of death and that they therefore were held for more than two years prior to sale. That decision, however, involved an estate where there was no trust. The court only decided that the general legatee held the securities which were transferred to him by the executor from the date of death. We agree with the Board that the intervening trusts broke the continuity so that the taxpayer only held the securities from the time they were distributed to him.

62 In the Campbell case certain Woolworth stock was purchased by the taxpayer prior to distribution to her by the trustee of other shares of the same kind. If she did not hold the shares she acquired under the will until they were distributed to her by the trustee, under the "first-in-first-out" rule, her own shares should be treated as sold prior to those which were delivered to her by the trustee. We agree with the Board that her own shares must be regarded as sold first. During the time that the title to the shares remained in the trustee the taxpayer had no control over their disposition and they were not acquired until she obtained them as her own. Helvering v. San Joaquin Fruit & Investment Co., 297 U. S. 496.

The orders of the Board of Tax Appeals are affirmed.

63 In United States Circuit Court of Appeals, Second Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

RICHARD VAN NEST GAMBRILL, RESPONDENT

Appeal from the United States Board of Tax Appeals

Judgment

Filed June 28, 1940

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

D. E. ROBERTS, *Clerk.*

64 [File enlorsement omitted.]

65 [Clerk's certificate to foregoing transcript omitted in printing.]

66 Supreme Court of the United States

Order allowing certiorari

Filed November 12, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1941

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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 473

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

MARJORIE K. CAMPBELL

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 28, 1940
CERTIORARI GRANTED NOVEMBER 12, 1940

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 473

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

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MARJORIE K. CAMPBELL

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Proceedings before United States Board of Tax Appeals	1	1
Docket entries	1	1
Petition	4	2
Exhibit A—Notice of deficiency dated February 27, 1936, from office of Commissioner of Internal Revenue to Mrs. Marjorie K. Campbell	37	22
Answer	44	25
Reply	64	37
Amended petition	67	38
Answer to amended petition	100	58
Amended reply	119	69
Stipulation of facts	122	71
Exhibit A—Last will and testament of Seymour H. Knox dated May 12, 1915	152	87
Respondent's Exhibit A—Decree dated December 12, 1938—Surrogate's Court, Erie County	177	103
Memorandum opinion, Murdock, M	191	112
Decision	201	118
Petition for review and assignments of error	202	118
Notices of filing petition for review	219	123
Amended praecipe for record	227	131
Certificate of clerk [omitted in printing]	229	133
Proceedings in U. S. C. A., Second Circuit	230	133

	Original	Print
Opinion, Hand, J.	230	133
Judgment	240	139
Clerk's certificate [omitted in printing]	242	139
Order allowing certiorari	243	140

1 Before United States Board of Tax Appeals

Docket No. 84639

MARJORIE K. CAMPBELL, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket entries

Appearances: For Taxpayer.—Ralph M. Andrews, Esq., Dwight Taylor, Esq.; John L. Kenefick, Esq.; Ernest J. Brown, Esq. For Comm'r.—B. M. Brodsky, Esq.; W. H. Schwatka, Esq.; E. L. Updike, Esq.

1936

May 25—Petition received and filed. Taxpayer notified. (Fee paid)

May 25—Copy of petition served on General Counsel.

July 24—Answer filed by General Counsel.

July 31—Copy of answer served on taxpayer.

Sept. 3—Reply to answer filed by taxpayer. 9/4/36 copy served.

1937

July 20—Motion for circuit hearing at Buffalo, N. Y., filed by General Counsel.

July 23—Hearing set August 18, 1937, on motion.

2 Aug. 18—Hearing had before Mr. Mellot on motion of respondent to consolidate dockets 61658, 62811, 63186, 63245, 51, 64523, 64908, 10 to 15, 24, 65011, 24, 65202, 65393, 71815, 16, 77824, 27 & 28, 84639, 40, 41 & 42 and to deny his own motion for circuit hearing—granted. Motion filed at hearing.

Aug. 26—Hearing set Nov. 1, 1937.

Sept. 4—Motion for continuance until after Jan. 1, 1938 filed by taxpayer, 9/7/37 granted to Spring of 1938.

Sept. 4—Notice of the appearance of Dwight Taylor as counsel for taxpayer filed.

Dec. 14—Notice issued placing proceeding on Washington, D. C., Calendar.

1938

Oct. 7—Hearing set Dec. 5, 1938.

Nov. 28—Motion for a continuance to Dec. 14, 1938, or a date early in January 1939, filed by taxpayer. 11/30/38 granted to 12/14/38.

Dec. 12—Motion for leave to file amended petition, amended petition lodged, filed by taxpayer.
Dec. 13—Copy of motion for leave to file amended petition and amended petition served on General Counsel.
Dec. 14—Hearing had before Mr. Murdock on merits. Submitted. On motion of respondent to file amended answer—granted Motion of petitioner to file amended reply—grahted. Motion and amendment to amended answer filed. Motion and amended reply filed. Stipulation of facts filed. Appearance of John L. Kenefick, Ernest J. Brown filed.
Dec. 28—Transcript of hearing of Dec. 14, 1938, filed.

3 1939

Jan. 12—Brief filed by taxpayer. 1/12/39 copy served.
Feb. 16—Motion for extension to March 10, 1939 to file brief, filed by General Counsel. Brief lodged 3/10/39—Granted 3/11/39.
Mar. 21—Stipulation to correct transcript filed.
Mar. 27—Reply brief filed by taxpayer. 3/27/39 copy served.
May 19—Opinion rendered, Mr. Murdock, Div. 3. Decision will be entered under Rule 50.
June 13—Computation of deficiency filed by General Counsel.
June 15—Hearing set July 5, 1939 on settlement.
June 23—Consent to settlement filed by taxpayer.
June 30—Decision entered, J. R. Murdock, Div. 3.
Sept. 22—Petition for review by U. S. Circuit Court of Appeals (2) with assignments of error filed by General Counsel.
Sept. 30—Proof of service filed by General Counsel. 4—3 attorneys and taxpayer.
Oct. 10—Praecipe filed.
Oct. 20—Proof of service of filing praecipe filed by General Counsel.
Oct. 21—Agreed amended praecipe for record filed with proof of service thereon.

4 Before United States Board of Tax Appeals

Docket No. 84639

[Same title.]

Petition

Filed May 25, 1936

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of

Internal Revenue in his notice of deficiency dated February 27, 1936 (IT:AR:A-2 MEW-90D), and as a basis of her proceeding alleges as follows:

1. At all the times hereinafter mentioned petitioner was and still is a resident of the Village of East Aurora, County of Erie and State of New York.

2. The notice of deficiency (a copy of which is attached hereto marked "Exhibit A") was mailed to the petitioner on February 27, 1936.

3. The tax in controversy is an income tax for the calendar year 1933, and amounts to the sum of $86,937.47.

4. The determination of tax set forth in said deficiency letter is based upon the following errors:

I

The disallowance by the Commissioner of Internal Revenue of a credit of $381.78 against petitioner's income tax on account of British income taxes withheld from dividends paid petitioner by an incorporated English company.

5

II

The determination by the Commissioner of Internal Revenue that a dividend of $672.00 received by petitioner from the Great Southern Lumber Company is taxable to petitioner to the extent of 83.6544% thereof.

III

The determination by the Commissioner of Internal Revenue that, for the purpose of determining gain or loss, petitioner's cost basis on the sale during the calendar year 1933 of certain shares of the common stock of United States Steel Corporation and American Telephone & Telegraph Company, and of certain bonds of the Federal Land Banks of Louisville, Kentucky, and Columbus, Ohio, which petitioner had acquired from her father's testamentary trustees, and which had theretofore been purchased by said trustees, was the cost of said securities to said trustees.

IV

The determination by the Commissioner of Internal Revenue that, for the purpose of determining gain or loss, petitioner's cost basis on the sale during the calendar year 1933 of certain shares of the capital stock of The Atchison, Topeka, & Santa Fe Railway Company, which petitioner had acquired from her father's testamentary trustees, was as follows:

i. As to so much thereof as was purchased by her father prior to his death, the fair market value of said securities on the date of their distribution by her father's executors to her father's testamentary trustees.

ii. As to so much thereof as was purchased by her father's testamentary trustees, the cost thereof to said trustees.

V

The determination by the Commissioner of Internal Revenue that, for the purpose of determining gain or loss, petitioner's cost basis on the sale during the calendar year 1933 of certain corporate stock of the City of New York issued for water supply purposes (4's of 1959) and of certain shares of the capital stock of Southern Pacific Railroad Company, Hotels Statler Company, Inc., and Union Pacific Railroad Company, which petitioner had acquired from her father's testamentary trustees, and which had been purchased by her father prior to his death, was the fair market value of said securities on the date of the distribution thereof by her father's executors to her father's testamentary trustees.

VI

The determination by the Commissioner of Internal Revenue that, for the purpose of determining gain or loss, petitioner's cost basis on the sale during the calendar year 1933 of certain bonds of the Cities of Philadelphia, Pennsylvania; Auburn, New York; and Rochester, New York, which petitioner had acquired from her father's testamentary trustees, and which had theretofore been purchased by her father's executors, was the fair market value of said securities on the date of the distribution thereof by her father's executors to her father's testamentary trustees.

VII

The determination by the Commissioner of Internal Revenue that, for the purpose of determining gain or loss, petitioner's cost basis on the sale during the calendar year 1933 of certain shares of the $25.00 par value preferred stock of Buffalo, Niagara & Eastern Power Corporation which petitioner had acquired from her father's testamentary trustees, and of certain shares of the common stock and warrants of Niagara Hudson Power Corporation which were derived from stock which petitioner had acquired from her father's testamentary trustees, was as follows:

i. As to so much thereof as was purchased by her father's executors, the cost thereof to said executors.

ii. As to so much thereof as was purchased by her father's testamentary trustees, the cost thereof to said trustees.

VIII

The determination by the Commissioner of Internal Revenue that on petitioner's sale during the calendar year 1933 of 10,000 shares of the capital stock of F. W. Woolworth Company, petitioner derived a capital gain of $318,128.92 instead of sustaining a capital loss of $278,854.33, upon the grounds:

i. That in the application of the "first-in—first-out" rule, the order of acquisition should be determined by employing the dates as of which petitioner's cost basis is ascertained rather than the dates on which petitioner physically acquired the securities; and, therefore, that all of the stock sold must be deemed to be out of lots acquired by petitioner from her father's estate; and

ii. That petitioner's cost basis in stock distributed to her by her father's testamentary trustees, and which had
8 theretofore beeen purchased by her father prior to his death, is the fair market value of said stock on July 1, 1921, the date of the distribution thereof by her father's executors to her father's testamentary trustees.

IX

The disallowance by the Commissioner of Internal Revenue of an ordinary loss of $5,250.00 sustained by petitioner on the sale during the calendar year 1933 of $50,000.00 face amount of New York City corporate stock (4½'s of 1957), upon the ground that petitioner acquired substantially identical securities in the same amount within thirty days before or after said sale.

5. The facts upon which petitioner relies as the basis of this proceeding are as follows:

I

(a) Throughout the year 1933 petitioner was the owner, among other things, of certain shares of stock of F. W. Woolworth & Co., Ltd., a British incorporated company.

(b) On various dates during said year 1933 there became payable to petitioner, dividends in respect of her said shares in said F. W. Woolworth & Co., Ltd., in the aggregate amount of $1,527.12.

(c) Upon information and belief, said dividends were subject to a British income tax under the English law, and the payor

company, in each case, is required to withhold from the
9 dividends paid the amount of said tax. The amount of said tax withheld on petitioner's dividends from the above source was $381.78 in American funds.

(d) In her income tax return for the calendar year 1933, filed with the Collector of Internal Revenue at Buffalo, New York, on or about March 15, 1934, petitioner included in gross income the gross dividend payable to her of $1,527.12, and inserted in item 38 of her said return for that year the amount of $381.78, the tax withheld.

(e) Respondent, in his deficiency letter, among other things, while allowing a deduction from gross income on account of said foreign tax of $381.78, has failed to allow any part of said amount as a credit against petitioner's alleged deficiency.

II

(f) On July 1, 1933, and for some time prior thereto petitioner was the owner of 224 shares of the capital stock of Great Southern Lumber Company, a Pennsylvania corporation with its principal office in the City of Harrisburg, Pennsylvania.

(g) Said Great Southern Lumber Company, in the year 1933, and for many years prior thereto, was the owner of a large quantity of long leaf yellow pine timber situated in the northern part of the State of Louisiana, and owned and operated a sawmill in the City of Bogalusa, Louisiana. In the year 1933 the corporation's land, to a very large extent, had been cut over and stripped of its stand, and in that year the corporation was approach-
10 ing the end of its timber operation. During said year and for several years prior thereto the corporation had taken steps toward gradual liquidation.

(h) Prior to January 21, 1933, the Great Southern Lumber Company had an authorized issue of capital stock consisting of 160,000 shares of the par value of $80.00 each, all of which said shares were common stock and amounted in the aggregate to $12,800,000.00.

(i) At a meeting of the board of directors of the Great Southern Lumber Company held January 21, 1933, a meeting of the stockholders of said corporation was called to be held on April 26, 1933, for the purpose of voting upon a proposition for a reduction of the capital stock of said corporation from $12,800,000.00 to $12,320,000.00, to be effected by a reduction of the par value of the corporation's shares from $80.00 to $77.00 per share. Said meeting of the stockholders was duly held on April 26, 1933, and the following resolutions were duly adopted:

"Resolved, That the capital of Great Southern Lumber Company be authorized to be reduced from $12,800,000.00 to $12,320,000.00, the same to be effected by a reduction in the par value of shares;

"Resolved, That the actual reduction in the said corporation's capital stock shall be made by its Board of Directors at such time as the said Board, in its discretion, shall determine."

* * * * * * *

"Resolved, That the par value of shares of capital stock
11 of Great Southern Lumber Company be, and the same are, hereby authorized to be reduced from $80.00 per share to $77.00 per share, so that the capital stock of the company thereafter shall consist of 160,000 shares with a par value of $77.00, aggregating, at par, $12,320,000.00;

"Resolved, That the actual reduction in the par value of said shares of said corporation shall be made by its Board of Directors at such time as the said board, in its discretion, shall determine."

(j) The Judges' Return of Election to reduce the capital stock and to change the par value of the corporation's shares were thereafter duly filed in the office of the Secretary of the Commonwealth of Pennsylvania.

(k) At a meeting of the board of directors of said Great Southern Lumber Company held on June 27, 1933, the following resolution was duly adopted:

"Resolved: That the capital stock of this Company be, and the same is hereby actually reduced from $12,800,000.00 to $12,320,000.00;

"Resolved: That the par value of shares of capital stock of this company be, and the same is hereby reduced from $80.00 per share to $77.00 per share."

(l) Thereafter, and in accordance with statutory proceedings for the reduction of capital stock and the reduction of par value of its shares, and as required by the laws of Pennsylvania, said Great Southern Lumber Company duly paid to its stockholders of record the sum of $3.00 per share, charging said distribution to its capital stock account, and reducing
12 its authorized and outstanding issue of capital stock accordingly. The par value of each certificate of outstanding capital stock of the corporation was changed from $80.00 per share to $77.00 per share.

(m) Petitioner duly deposited certificates representing said 224 shares of the capital stock of said Great Southern Lumber Company, and on July 1, 1933, a partial liquidating dividend of $672.00 was duly paid to petitioner.

(n) Thereupon there were returned to petitioner certificates representing said 224 shares, having a par value of $77.00 per share. Petitioner credited the entire amount of said distribution to her personal capital account.

(o) The amount distributed by said Great Southern Lumber Company to petitioner, as aforesaid, was less than the fair market value of said stock on July 1, 1928, the date on which said stock was distributed to petitioner by her fathers' testamentary trustees, and was less than the fair market value of said stock on July 1, 1921, the date on which said stock was distributed by her father's executors to his testamentary trustees, as adjusted on account of intervening distributions from capital, and petitioner did not include any part of the amount so received in her taxable net income for the year 1933.

(p) The Commissioner of Internal Revenue, in his final determination, has included in petitioner's taxable net income an amount of $562.16 of the total distribution of $672.00 from said Great Southern Lumber Company, above described, upon the ground that 83.6544% of said distribution to petitioner was taxable to her.

13 III

(q) Petitioner's father, Seymour H. Knox, died on May 16, 1915, leaving a last will and testament, by the provisions of which the testator, after directing payment of his debts and the making of certain specific bequests, provided, in part, as follows, with respect to the disposition of his residuary estate:

"(D) Twenty (20) per cent of all the rest, residue and remainder of my said estate (not including, however, the shares of capital stock of the six corporations mentioned in the first paragraph of this Article Twenty-first) I give, devise and bequeath to my brother, Henry D. Knox and Walter P. Cooke, both of the City of Buffalo, in trust nevertheless, for the following uses and purposes, to wit:

"To receive, hold and, from time to time, invest and reinvest the same, and to collect the rents, income, issues, and profits on the property from time to time constituting such trust fund and to pay over so much of the net income arising therefrom, as to my said trustees shall seem wise and proper toward the support, maintenance and education of my daughter, Marjorie Knox, until she shall arrive at the age of twenty-one (21) years, and to accumulate the balance of the income during her minority for her benefit, and to pay over the accumulated income to her when she shall arrive at the age of twenty-one (21) years, and there-

after to pay over the entire net income to my said daughter, Marjorie Knox, until she shall arrive at the age of twenty-eight (28) years, at which time, I give, devise and bequeath to my said daughter, Marjorie Knox, one-half (½) of the property then constituting said trust fund and I direct my said trustees
14 to pay over the net income on the remaining one-half (½) of said trust fund until she shall arrive at the age of thirty-five (35) years, at which time I give, devise, and bequeath the remaining part of said trust fund to my said daughter, Marjorie Knox, and to her heirs and assigns forever.

"In the event that my said daughter, Marjorie Knox, shall die before reaching the age of thirty-five (35) years, I give, devise and bequeath any part or portion of said trust fund, which has not then been paid over to her, or to the possession of which at the time of her death she was not entitled, unto the issue of said Marjorie Knox, if any, surviving her, to be divided among them, share and share alike. And in case there be no issue her surviving, then I give, devise, and bequeath said trust fund unto her heirs."

(r) Pursuant to authority vested in them by the provisions of petitioner's father's will quoted above at paragraph III (q), said testamentary trustees bought the following securities on or about the dates and for the amounts hereinafter stated:

Date	Quantity	Security	Amount
Dec. 31, 1925	600 shares common	United States Steel Corporation	$80,287.50
Dec. 31, 1925	150 shares	American Telephone & Telegraph Company	21,343.75
July 31, 1926	25 shares	American Telephone & Telegraph Company	2,568.75
May 31, 1923	$25,000.00 face amount	Federal Land Bank bonds (Louisville) (4½s of 1953).	25,125.00
May 31, 1925	$8,000.00 face amount	Federal Land Bank bonds (Columbus) (4½s of 1955).	8,220.00

15 (s) On or about June 1, 1928, said testamentary trustees of petitioner's father's estate received, with respect to said 175 shares of the stock of American Telephone & Telegraph Company, one warrant for each share held. Said warrants entitled the holder thereof to acquire one new share of the stock of said American Telephone & Telegraph Company at $100.00 per share for each six warrants held.

(t) On or about June 1, 1927, said testamentary trustees received a 40% stock dividend with respect to said 600 shares of the common stock of United States Steel Corporation, increasing their holdings therein to 840 shares.

(u) On or about July 5, 1928, said testamentary trustees distributed to petitioner, among other things, the following securi-

ties which have been heretofore referred to, and which, on said date, had a fair market value as hereinafter stated:

Quantity	Security	Unit price	Value
840 shares common	United States Steel Corporation	$139.50	$117,180.00
175 shares	American Telephone & Telegraph Company	177.50	31,062.50
175 warrants	American Telephone & Telegraph Company	12.25	2,143.60
$25,000.00 face amount	Federal Land Bank bonds (Louisville) (4½'s of 1953).	100.125	25,031.25
$8,000.00 face amount	Federal Land Bank bonds (Columbus) (5½'s of 1955).	100.25	8,020.00

16 (v) On or about July 25, 1928, petitioner exercised the rights which she had received from said testamentary trustees, and upon the exercise thereof acquired 29 additional shares of the capital stock of said American Telephone & Telegraph Company at an expenditure of $2,900.00.

(w) During the calendar year 1933 petitioner duly sold the above described securities on the dates and in the amounts hereinafter stated:

Date	Quantity	Security	Sale price
Dec. 20, 1933	840 shares common	United States Steel Corporation	$36,896.66
Dec. 20, 1933	204 shares	American Telephone & Telegraph Company	22,465.15
Dec. 22, 1933	$25,000.00 face amount	Federal Land Bank bonds (Louisville) (4½'s of 1953).	20,593.75
Dec. 22, 1933	$8,000.00 face amount	Federal Land Bank bonds (Columbus) (4½'s of 1955).	6,630.00

(x) In her return for the calendar year 1933 petitioner reported capital losses on the sales of the above securities in the following amounts, and computed as follows:

17 Quantity	Security	Fair market value July 5, 1928	Sale price	Capital loss
840 shares common	United States Steel Corporation	$117,180.00	$36,896.66	$80,283.34
204 shares	American Telephone & Telegraph Company.			
Value of:				
175 shares $31,062.50				
175 warrants 2,143.60				
Purchase price of 29 shares 2,900.00				
		36,106.10	22,465.15	13,640.95
$25,000.00 face amount	Federal Land Bank bonds (Louisville) 4½'s of 1953).	25,031.25	20,593.75	4,437.50
$8,000.00 face amount	Federal Land Bank bonds (Columbus) 4½'s of 1955).	8,020.00	6,630.00	1,390.00

(y) The Commissioner of Internal Revenue, in his final determination, has reduced petitioner's cost basis in the above described

securities, and has reduced the capital losses claimed by petitioner on the sales thereof in the following amounts:

18	United States Steel Corporation	$36,892.50
	American Telephone & Telegraph Company	9,293.60
	Federal Land Bank bonds (Louisville)	605.63
	Federal Land Bank bonds (Columbus)	204.00

The Commissioner of Internal Revenue has made said reductions upon the ground that petitioner's cost basis in the above securities is the cost thereof to her father's testamentary trustees, and in determining the said trustees' cost of the Federal Land Bank bonds of Louisville and Columbus has employed said trustees' average cost in those and certain other bonds.

IV.

(z) On the date of the death of petitioner's father, May 16, 1915, the latter was the owner of 500 shares of the common capital stock of The Atchison, Topeka & Santa Fe Railway Company, which had a fair market value on that date of and was appraised at $49,625.00.

(aa) Pursuant to the provisions of petitioner's father's will above quoted at paragraph III (q), 20% of said shares of stock of The Atchison, Topeka & Santa Fe Railway Company, or 100 shares, was distributed by the executors to the testamentary trustees for petitioner on July 1, 1921. Said stock had a fair market value on that date of $80.50 per share, or a total value of $8,050.00.

(bb) Thereafter and on April 30, 1928, said testamentary trustees purchased 4 additional shares of said stock for $400.00.

(cc) Upon petitioner's attaining the age of 28 years on July 5, 1928, said testamentary trustees distributed said 104
19 shares of stock of The Atchison, Topeka & Santa Fe Railway Company to petitioner. On that date said shares had a fair market value of $189.875 per share, or a total value of $19,747.00.

(dd) On December 20, 1933, petitioner duly sold said 104 shares, receiving therefor $5,509.94.

(ee) In her return for the calendar year 1933 petitioner claimed a capital loss of $14,237.06 on the sale of said 104 shares of stock of The Atchison, Topeka & Santa Fe Railway Company, being the difference between the fair market value of said shares at the date they were distributed to her by her father's testamentary trustees, and the sale price thereof.

(ff) The Commissioner of Internal Revenue, in his final determination, has determined that the petitioner's loss on said sale was $2,940.06, being the difference between the fair market

value of 100 of said shares on the date they were distributed to said testamentary trustees by said executors, plus the trustees' cost of the 4 shares purchased by them in 1928, and the sale price thereof.

V

(gg) On July 1, 1921, the executors of petitioner's father's estate distributed to the testamentary trustees for petitioner, the following securities which, on that date, had a fair market value as follows:

20 Quantity	Security	Unit price	Value
$10,000.00 face amount	City of New York corporate stock issued for water-supply purposes (4's of 1959).	$96.50	$9,650.00
125 shares	Southern Pacific Railroad Company	74.375	9,296.88
160 shares	Hotels Statler Company, Inc.	75.00	12,000.00
100 shares	Union Pacific Railroad Company	117.875	11,787.50

(hh) Upon petitioner's attaining the age of 28 years on July 5, 1928, the above-described securities were distributed to her by her father's testamentary trustees. On that date said securities had fair market values as follows:

Quantity	Security	Unit price	Value
$10,000.00 face amount	City of New York corporate stock issued for water-supply purposes (4's of 1959).	$99.4375	$9,943.75
125 shares	Southern Pacific Railroad Company	122.25	15,281.25
160 shares	Hotels Statler Company, Inc.	100.00	16,000.00
100 shares	Union Pacific Railroad Company	195.00	19,500.00

(ii) Thereafter and on December 28, 1929, a 100% stock dividend of 160 shares was declared and received by petitioner on her holdings of the stock of Hotels Statler
21 Company, Inc., bringing her total holdings of said stock to 320 shares.

(jj) Thereafter petitioner sold the above described securities on the dates and for the amounts following:

Date	Quantity	Security	Sale price
Dec. 21, 1933	$10,000.00 face amount	City of New York corporate stock issued for water supply purposes (4's of 1959).	$7,837.50
Dec. 20, 1933	125 shares	Southern Pacific Railroad Company	2,381.87
Dec. 26, 1933	320 shares	Hotels Statler Company, Inc.	2,833.60
Dec. 20, 1933	100 shares	Union Pacific Railroad Company	11,191.00

(kk) In her return for the calendar year 1933 petitioner claimed capital losses on the above sales measured by the differ-

ence between the fair market values of said securities on July 5, 1928, the date on which they were distributed to her by said testamentary trustees, and the said prices, as follows:

City of New York corporate stock issued for water supply purposes (4's of 1959)	$2,106.25
Southern Pacific Railroad Company	12,899.38
Hotels Statler Company, Inc.	13,166.40
Union Pacific Railroad Company	8,309.00

22 (ll) The Commissioner of Internal Revenue, in his final determination, has determined that petitioner's capital losses on the sales of the above securities should be the difference between their fair market values on July 1, 1921, the date on which said securities were distributed by petitioner's father's executors to his testamentary trustees, and the sale prices thereof, and has reduced said losses by the following amounts:

City of New York corporate stock issued for water supply purposes (4's of 1959)	$293.75
Southern Pacific Railroad Company	5,984.37
Hotels Statler Company, Inc.	4,000.00
Union Pacific Railroad Company	7,712.50

VI

(mm) On July 1, 1921, the executors of the estate of petitioner's father distributed to the testamentary trustees for petitioner, pursuant to the provisions of the will above quoted at paragraph III (q), $50,000.00 face amount of the bonds of the City of Philadelphia (4's of 1946), $10,000 face amount of the bonds of the City of Auburn, New York (4¾'s of 1933), and $20,000.00 face amount of the bonds of the City of Rochester, New York (4½'s of 1933).

(nn) Upon information and belief, the Commissioner of Internal Revenue has determined the fair market value of said City of Philadelphia bonds on the date of said distribution to be $50,687.50, of said City of Auburn bonds to be $10,227.83, and of said City of Rochester bonds to be $20,082.50.

23 (oo) When petitioner attained the age of 30 years on July 5, 1928, said testamentary trustees distributed the above described bonds to petitioner. On that date said bonds of the City of Philadelphia had a fair market value of $108.38 per $100.00, or an aggregate fair market value of $54,190.00. On that date said bonds of the City of Auburn had a fair market value of $102.2783 per $100.00, or an aggregate fair market value of $10.227.83, and on said date said bonds of the City of Rochester had a fair market value of $102.74 per $100.00, or an aggregate fair market value of $20,548.00.

(pp) On or about November 10, 1933, petitioner duly sold said bonds of the City of Philadelphia (4's of 1946) for $42,930.41.

(qq) During said year 1933 all of said bonds of the cities of Auburn and Rochester matured, petitioner receiving on the redemption thereof $10,000.00 for the City of Auburn bonds and $20,000.00 for the City of Rochester bonds.

(rr) In her return for the calendar year 1933 petitioner claimed a capital loss on the sale of said City of Philadelphia bonds (4's of 1946) of $11,259.59, and capital losses on the maturity of the City of Auburn and City of Rochester bonds of $227.83 and $548.00, respectively, said claimed losses being the difference between the fair market values of said securities on the date on which they were distributed to petitioner by the said testamentary trustees and the amounts received therefor by the petitioner on her disposition thereof during the calendar year 1933.

(ss) The Commissioner of Internal Revenue, in his final determination, has reduced the capital loss claimed by petitioner
24 on the sale of the City of Philadelphia bonds to $7,757.09, has held that the loss of $227.83 claimed by petitioner on the maturity of the City of Auburn bonds was an ordinary and not a capital loss, and that petitioner's loss on the maturity of the City of Rochester bonds should be reduced to $82.50 and constituted an ordinary loss instead of a capital loss.

VII

(tt) On June 15, 1925, the executors of the estate of petitioner's father distributed to the testamentary trustees for petitioner, pursuant to the provisions of the will above quoted at paragraph III (q), 214 shares of the common capital stock of Niagara, Lockport & Ontario Power Company, which had theretofore cost said executors $4,537.06. Said 214 shares had a fair market value on said June 15, 1925, of $76.00 per share, or an aggregate value of $16,264.00.

(uu) Thereafter and on or about August 1, 1925, said testamentary trustees exchanged said 214 shares of Niagara, Lockport & Ontario Power Company common stock for 267½ shares of the preferred stock and 267½ shares of the common stock of Buffalo, Niagara & Eastern Power Corporation, said exchange being pursuant to a plan of reorganization to which both said Niagara, Lockport & Ontario Power Company and Buffalo, Niagara & Eastern Power Corporation were parties. On the date of said exchange the fair market value of said common stock of Buffalo, Niagara & Eastern Power Corporation was $42.375 per share and of the preferred stock of said corporation was $24.375 per share.

(vv) Thereafter and on August 31, 1925, said testamentary trustees purchased for $1,202.50, 32½ additional shares of

25 the common stock of said Buffalo, Niagara & Eastern Power Corporation, bringing their total holdings of said common stock to 300 shares.

(ww) On the same date said testamentary trustees purchased 32½ shares of the $25.00 par value preferred stock of Buffalo, Niagara & Eastern Power Corporation, paying therefor $780.25.

(xx) Subsequently and on or about January 31, 1926, said testamentary trustees purchased 75 shares of the Class "A" common stock of said Buffalo, Niagara & Eastern Power Corporation, paying therefor $1,500.00.

(yy) Thereafter and on July 5, 1928, the date on which petitioner attained the age of 28 years, said testamentary trustees distributed to her said 300 shares of the $25.00 par value preferred stock of Buffalo, Niagara & Eastern Power Corporation, which, on that date, had a fair market value of $26.125 per share, or an aggregate fair market value of $7,837.50, said 300 shares of the common stock of Buffalo, Niagara & Eastern Power Corporation, which, on that date, had a fair market value of $40.25 per share, or an aggregate fair market value of $12,075.00, and said 75 shares of the Class "A" common stock of Buffalo, Niagara & Eastern Power Corporation, which, on that date had a fair market value of $37.50 per share, or a total fair market value of $2,812.50.

(zz) Thereafter and on or about August 19, 1929, petitioner exchanged said 300 shares of the common stock of Buffalo, Niagara & Eastern Power Corporation for 1,200 shares of the common stock of Niagara Hudson Power Corporation and

26 300 Class "A" option warrants of said Niagara Hudson Power Corporation, which warrants entitled the holder to purchase at any time on or before October 1, 1944, one share of the corporation's common stock at $35.00 per share for each warrant held.

(aaa) On the same date (August 19, 1929) the petitioner exchanged said 75 shares of the Class "A" common stock of Buffalo, Niagara & Eastern Power Corporation for 300 shares of the common stock of Niagara Hudson Power Corporation and 75 Class "A" option warrants of said Niagara Hudson Power Corporation, which warrants entitled the holder to purchase at any time on or before October 1, 1944, one share of the corporation's common stock at $35.00 per share for each warrant held.

(bbb) On said date (August 19, 1929) common stock of said Niagara Hudson Power Corporation had a fair market value of $26.8125 per share, and the Class "A" option warrants had a fair market value on that date of $9.125 each. Said exchange was

pursuant to a plan of reorganization to which both said Buffalo, Niagara & Eastern Power Corporation and said Niagara Hudson Power Corporation were parties.

(ccc) Thereafter and on August 8, 1932, pursuant to corporate action taken by the corporation to reduce its capital stock from 45,000,000 shares of the par value of $10.00 each to 15,000,000 shares of the par value of $15.00 each, petitioner exchanged her 1,500 shares of old common stock of said Niagara Hudson Power Corporation, having a par value of $10.00 each, for 500 new shares of common stock of said corporation, having a par value of $15.00 each, reducing her holdings of such common
27 stock to 500 shares. A corresponding reduction was accomplished in the number of outstanding Class "A" option warrants, by a similar exchange of one for three, petitioner's holdings thereof being reduced to 125 warrants.

(ddd) Subsequently and on December 20, 1933, petitioner duly sold said 500 shares of the common stock of Niagara Hudson Power Corporation for $2,506.75, said 125 Class "A" option warrants of said corporation for $40.24, and said 300 shares of the $25.00 par value preferred stock of Buffalo, Niagara & Eastern Power Corporation for $4,800.50.

(eee) In her return for the calendar year 1933 which was filed on or about March 15, 1934, with the Collector of Internal Revenue at Buffalo, New York, petitioner reported capital losses on account of the sale of said 500 shares of Niagara Hudson Power Corporation common stock and said 125 Class "A" option warrants of said corporation of $12,340.51, and on the sale of said 300 shares of $25.00 par value preferred stock of Buffalo, Niagara & Eastern Power Corporation of $3,037.00, the amounts of said losses being the difference between the fair market value of said securities on July 5, 1928, the date of distribution thereof to petitioner by her father's testamentary trustees, and the sale price thereof.

(fff) The Commissioner of Internal Revenue, in his final determination, has reduced the capital loss claimed by petitioner on the sale of said 500 shares of common stock and 125 Class "A" option warrants of Niagara Hudson Power Corporation to $3,035.78, and has disallowed the loss claimed by petitioner on the sale of said 300 shares of $25.00 par value preferred stock of Buffalo, Niagara & Eastern Power Corporation
28 and has determined a capital gain thereon of $2,363.46.

In determining the adjusted loss on the Niagara Hudson Power Corporation common stock and the Class "A" option warrants of said corporation, the Commissioner of Internal Revenue has used that part of the cost to the executors of petitioner's father's estate of said 214 shares of Niagara, Lockport & Ontario

Power Company common stock which is allocable to the 267½ shares of common stock of Buffalo, Niagara & Eastern Power Corporation received by the testamentary trustees on the exchange of August 1, 1925, plus the said trustees' cost of the 32½ additional shares of common stock of Buffalo, Niagara & Eastern Power Corporation purchased by them on August 31, 1925, plus the said trustees' cost of the 75 shares of Class "A" common stock of Buffalo, Niagara & Eastern Power Corporation purchased by them on January 31, 1928, or an aggregate adjusted cost basis of $5,582.77.

(ggg) In determining a gain on the sale of the said preferred stock of Buffalo, Niagara & Eastern Power Corporation, the Commissioner of Internal Revenue has used as the cost basis that part of the said executors' cost of the 214 shares of common stock of Niagara, Lockport & Ontario Power Company which is allocable to the 267½ shares of said preferred stock of Buffalo, Niagara & Eastern Power Corporation received by said testamentary trustees on the exchange of August 1, 1925, plus the cost to said trustees of the 32½ shares of Buffalo, Niagara & Eastern Power Corporation preferred stock purchased by them on August 31, 1925, or an aggregate adjusted cost basis of $2,437.04.

VIII

(hhh) On July 1, 1921, petitioner's father's executors distributed to the testamentary trustees for petitioner, in
29 accordance with the terms of the will above quoted at paragraph III (q), 4,964 shares of the stock of F. W. Woolworth Company, having a par value of $100.00 per share, which, on that date, had a fair market value of $110.00 per share, or an aggregate fair market value of $546,040.00.

(iii) Subsequently and on or about June 30, 1924, said trustees, pursuant to proper corporate action by which the par value of the shares of stock of said F. W. Woolworth Company was reduced from $100.00 each to $25.00 each, exchanged said 4,964 shares of the $100.00 par value F. W. Woolworth Company stock for 19,856 shares of the $25.00 par value F. W. Woolworth Company stock.

(jjj) On or about January 31, 1925, said testamentary trustees purchased for $16,344.00 in cash, 144 additional shares of the stock of said F. W. Woolworth Company, having a par value of $25.00 each, out of which 125 shares were sold on December 31, 1925, at a profit. Out of the lot of 19,856 shares of said stock acquired on the exchange of June 30, 1924, said trustees, on December 31, 1925, sold 125 shares at a profit. On January 31, 1926, said trustees purchased 250 additional shares of said stock for $50,925.00.

(kkk) On February 1, 1927, said F. W. Woolworth Company declared a 50% stock dividend, the said trustees receiving thereon 10,000 shares, bringing their total holdings of said stock to 30,000 shares.

(lll) Upon petitioner's attaining the age of 28 years on July 5, 1928, said trustees duly distributed to her one-half of their holdings of said F. W. Woolworth Company stock, namely,
30 15,000 shares, of the par value of $25.00 each, which, on that date, had a fair market value of $183.875 per share, or a total fair market value of $2,758,125.00.

(mmm) On various dates in 1926 and 1927 petitioner purchased individually 1,000 shares of said F. W. Woolworth Company stock, having a par value of $25.00 each, for $118,691.58.

(nnn) Thereafter and on June 24, 1929, after proper corporate action further reducing the par value of the corporation's shares from $25.00 each to $10.00 each, petitioner exchanged, on the basis of two and one-half for one, the block of 1,000 shares of said F. W. Woolworth Company stock which she had purchased individually and the block of 15,000 shares of said stock which she had acquired from her father's testamentary trustees, receiving in lieu thereof in stock having a par value of $10.00 per share, 2,500 shares and 37,500 shares, respectively.

(ooo) On various dates in December 1933, petitioner duly sold all of said 2,500 shares which represented her individual purchases of said F. W. Woolworth Company stock for $99,051.03, and from the lot of 37,500 shares of said stock acquired from her father's testamentary trustees she sold 7,500 shares for $292,411.22.

(ppp) In her return for the calendar year 1933 petitioner claimed a capital loss on the sale of said stock of $278,854.33, being the difference between the aggregate of petitioner's cost of the stock which she had purchased individually in 1926 and 1927 and the fair market value of so much of said stock which she had acquired from said testamentary trustees on the date of the distribution thereof to her, and the sale price thereof.

31 (qqq) The Commissioner of Internal Revenue, in his final determination, has disallowed said capital loss on the sale of said F. W. Woolworth Company stock and has determined a capital gain of $318,128.92, upon the ground that, as a result of the exchange on the basis of two and one-half for one, which occurred on June 24, 1929, the identity of petitioner's shares of stock of F. W. Woolworth Company was lost, that the "first-in—first-out" rule must be applied, and, therefore, that the 10,000 shares sold in December 1933, must be deemed to have been out of the lot of 37,500 shares of said stock which petitioner acquired from said testamentary trustees on July 5, 1928, and that peti-

tioner's cost basis therein is the fair market value of said shares on the date of the distribution thereof by the executors of petitioner's father's estate to said testamentary trustees.

IX

(rrr) On or about December 29, 1932, petitioner purchased $25,000.00 face amount of the corporate stock of the City of New York (4½'s due May 1, 1957) issued September 10, 1907, paying therefor $23,500.00. On the same date petitioner purchased $25,000.00 face amount of the corporate stock of the City of New York (4½'s due November 1, 1957) issued February 14, 1908, paying therefor $23,500.00. Both lots of bonds were registered securities.

(sss) Thereafter and on or about December 18, 1933, petitioner duly sold all of said bonds, receiving therefor on said sale $41,750.00.

(ttt) Subsequently and on or about December 23, 1933, petitioner purchased $10,000.00 face amount of the corporate
32 stock of the City of New York (4½'s due May 1, 1957) issued September 10, 1907, paying therefor $8,512.50.

(uuu) In her return for the calendar year 1933 petitioner reported an ordinary loss on the sale of $50,000.00 face amount of said corporate stock of the City of New York (4½'s due May 1, 1957, and 4½'s due November 1, 1957) acquired in December 1932, of $5,250.00.

(vvv) The Commissioner of Internal Revenue, in his final determination, has disallowed all of said loss, upon the ground that petitioner acquired substantially identical securities in the same amount within thirty days before or after said sale.

6. Wherefore, petitioner prays that this Board may hear the proceeding and determine that:

I

Petitioner is entitled to a credit of $381.78 against her 1933 income tax on account of British income taxes withheld at the source by the payor foreign corporation on dividends received by petitioner therefrom.

II

The distribution of Great Southern Lumber Company received by petitioner during the calendar year 1933 was a partial liquidating dividend of said Great Southern Lumber Company, properly chargeable to the corporation's capital stock account,

and was not a distribution of earnings or profits taxable to petitioner under the provisions of the Revenue Act of 1932.

33

III

For the purpose of determining gain or loss on petitioner's sale during the calendar year 1933 of certain shares of the common stocks of United States Steel Corporation and American Telephone & Telegraph Company, and of certain bonds of the Federal Land Banks of Louisville, Kentucky, and Columbus, Ohio, petitioner's cost basis is the fair market value of said securities on July 5, 1928, the date on which they were distributed to petitioner by her father's testamentary trustees.

IV

For the purpose of determining gain or loss on petitioner's sale during the calendar year 1933 of certain shares of the capital stock of The Atchison, Topeka & Santa Fe Railway Company, petitioner's cost basis is the fair market value of said securities on July 5, 1928, the date on which they were distributed to petitioner by her father's testamentary trustees.

V

For the purpose of determining gain or loss on petitioner's sale during the calendar year 1933 of certain corporate stock of the City of New York (4's of 1959) and certain shares of the capital stocks of Southern Pacific Railroad Company, Hotels Statler Company, Inc., and Union Pacific Railroad Company, petitioner's cost basis is the fair market value of said securities on July 5, 1928, the date on which they were distributed to petitioner by her father's testamentary trustees.

34

VI

For the purpose of determining gain or loss on petitioner's sale during the calendar year 1933 of certain bonds of the Cities of Philadelphia, Pennsylvania, Auburn and Rochester, New York, petitioner's cost basis is the fair market value of said bonds on July 5, 1928, the date on which they were distributed to petitioner by her father's testamentary trustees.

VII

For the purpose of determining gain or loss on petitioner's sale during the calendar year 1933 of certain shares of the $25.00

par value preferred stock of Buffalo, Niagara & Eastern Power Corporation, and of certain shares of the common stock and warrants of Niagara Hudson Power Corporation, petitioner's cost bases were, respectively, the fair market value as of July 5, 1928, of said $25.00 par value preferred stock of Buffalo, Niagara & Eastern Power Corporation, and the fair market value on that date of the common and Class "A" common stocks of Buffalo, Niagara & Eastern Power Corporation, from which said Niagara Hudson Power Corporation stock and warrants were derived, and which were distributed on said July 5, 1928, to petitioner by her father's testamentary trustees.

VIII

Petitioner sustained a capital loss of $278,854.33 on the sale during the calendar year 1933 of 10,000 shares of the capital stock of F. W. Woolworth Company, upon the ground:

i. That, for the purpose of applying the "first-in—first-
35 out" rule, the dates of acquisition should be the dates on which petitioner physically acquired her holdings of said stock and not the dates as of which petitioner's cost basis in said holdings is determined, and, therefore, that petitioner's purchases of said stock prior to July 5, 1928, must be exhausted first; and

ii. That on so much of said stock as was acquired by petitioner from her father's testamentary trustees, petitioner's cost basis is the fair market value thereof on July 5, 1928, the date on which said securities were distributed to her by said trustees.

IX

Petitioner sustained an ordinary loss of $4,200.00 on $40,000.00 face amount (out of a total of $50,000 face amount) of New York City corporate stock (4½'s of 1957) sold by petitioner during the calendar year 1933; that not in excess of $10,000.00 face amount of substantially identical securities was reacquired within thirty days before or after the date of said sale.

(S) RALPH M. ANDREWS,
Counsel for Petitioner,
Office and Post-Office Address,
1330 Marine Trust Building,
239 Main Street, Buffalo, New York.

36 [*Duly sworn to by Marjorie K. Campbell; jurat omitted in printing.*]

37 *Exhibit A annexed to petition*

SN–A.

OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
TREASURY DEPARTMENT,
Washington, Feb. 27, 1936.

Address Reply to Commissioner of Internal Revenue and Refer to—

MRS. MARJORIE K. CAMPBELL,
2100 Rand Building, Buffalo, New York.

MADAM: You are advised that the determination of your income tax liability for the taxable year 1933 discloses a deficiency of $86,937.47 as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1932, as amended by section 501 of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of
38 Internal Revenue, Washington, D. C., for the attention of IT:C:P–7. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner.
By CHAS. T. RUSSELL,
Deputy Commissioner.

Enclosures:
Statement.
Form 870.

STATEMENT

IT:AR:A–2.
MEW–90D.

In re: Mrs. Marjorie K. Campbell
2100 Rand Building
Buffalo, New York

Income Tax Liability

Year, 1933; income tax liability, $86,937.47; income tax assessed, none; deficiency, $86,937.47.

39 The deficiency shown herein is based upon the report dated November 1, 1935, prepared by Revenue Agent H. E. Murray, a copy of which was transmitted to you under date of December 2, 1935, and the following additional adjustment:

It is noted in a review of your return in this office that you received dividends in the amount of $1,527.12, less tax of $381.78, withheld, from the Woolworth Company Limited. The tax withheld was claimed as a credit on line 38 of the return. In this connection you are advised that there is no provision in the revenue laws permitting an individual owning stock in a foreign corporation to claim as a deduction or a credit income tax assessed against a foreign corporation. The Bureau holds that the income tax purported to have been withheld from dividend distributions by the British corporation was in fact the liability of the payor corporation. Therefore, the only amount which should be reported in your gross income is the amount actually received, $1,527.12 less $381.78, or $1,145.34. In the following computation the amount of $381.78 has been disallowed as a credit and allowed as an additional deduction from income.

A synopsis of your adjusted income tax liability follows:

Income shown on the return exclusive of capital net loss		$188,810.71
Add:		
1. Loss on sales decreased		5,250.00
2. Dividends adjusted		2,819.66
		$196,880.37
40 Less:		
3. Fiduciary income overstated	$2,257.50	
4. Contributions allowed	3,321.00	
5. Other deductions allowed	2,436.73	
6. Foreign tax adjustment	381.78	8,397.01
Adjusted income for surtax		$188,483.36
Less:		
Dividends	$200,728.31	
Personal exemption and credit for dependents	3,200.00	203,928.31
Balance subject to normal tax		None
Surtax on $188,483.36		$65,316.83
Tax at 12½% on adjusted capital net gain of $173,325.00		21,665.62
Total tax		$86,982.47
Less: Tax paid at source		45.00
Corrected income tax liability		$86,937.47
Income tax assessed, original account No. 664031		None
Deficiency in tax		$86,937.47

41 Explanation of Changes

1. Loss is decreased and income increased by $5,250.00, due to eliminating a loss claimed on the sale of City of New York

bonds on December 22, 1933. Since you bought substantially identical bonds on December 23, 1933, the transaction represents a wash sale, and the loss from such is not recognized under the provisions of section 118 (a) of the Revenue Act of 1932.

2. Dividend adjustment consists of two items, $2,257.50 of which is explained in item 3, and $562.16 represents 83.6544 per cent of $672.00 received from the Great Southern Lumber Co. representing the taxable portion of the dividends distributed by the company in 1933.

3. Fiduciary income has been decreased and dividends increased by $2,257.50, the 5 per cent tax withheld on dividends distributable from the Marjorie Knox Campbell Trust. The tax withheld should be applied as a deduction against other fiduciary income from the same source and not against gross dividends.

4. Due to increases in income, the deduction of $3,321.00 for contributions is now allowed.

5. Losses of $227.83 sustained on redemption of City of Auburn bonds, and $2,208.90 on City of Rochester bonds, or a total of $2,436.73 have been transferred from capital net loss to other deductions in accordance with I. T. 2678 (Cumulative Bulletin XII–1, page 117) which holds that loss sustained or gain realized from the redemption of bonds which have been held for more than two years may not be taxed as capital assets.

42 6. The adjustment of $381.78 for foreign taxes has been explained above.

Capital net loss reported as $527,764.97 has been changed to a gain of $173,325.00, or a net increase of $701,089.97, due mainly to adjustments to the cost basis used or applicable to the securities sold. It is noted that in the sale of the securities, which you received from the Marjorie Knox Campbell Trust, you used the values as at August 5, 1928, the date the trustee transferred the stocks to you.

The Bureau has used the fair market values as at July 1, 1921, for the securities transferred to the trustee when the trust was set up or the actual costs to the trustee of the stocks purchased by him. The trust was created under the will of Seymour H. Knox, who died on May 16, 1915.

Section 113 (a) (5) of the Revenue Act of 1932 provides that the cost basis of property acquired by general bequest shall be its fair market value at the date of distribution to the beneficiary. The date of distribution is held to be July 1, 1921, the date the securities were transferred by the executor of the estate to the trustee. Under General Counsel Memorandum 14893 (Internal Revenue Bulletin XIV No. 21, page 11), on July 1,

1921, you actually became entitled to the income from the property and later to the possession of the property or its equivalent.

An analysis of your account with the Woolworth stock shows that through the 2½ for 1 exchange in 1929 the identity of your various holdings in this stock was lost.

Therefore, in accordance with article 600 (4) of Regulations 77, the 10,000 shares sold in 1933 have been held to have come from the earliest acquisitions of the stock. This adjustment, which comprises the greater portion of the increase of $701,089.97, is as follows:

43	7,500 shares value at July 5, 1928, used by you	$551,625.00
	2,500 shares cost to you in 1926, 1927	118,691.58
	Total cost used by you	$670,316.58
	Value as at July 1, 1921, of 666⅔ shares at 100 (represented by the 10,000 shares sold)	73,333.33
	Cost overstated	$596,983.25

In compliance with your request dated February 4, 1936, this final notice of deficiency is now being forwarded.

44 Before United States Board of Tax Appeals

Docket No. 84639

[Same title.]

Answer

Filed July 24, 1936

The Commissioner of Internal Revenue by his attorney, Herman Oliphant, General Counsel for the Department of the Treasury, for answer to the petition filed in the above entitled appeal, admits, denies, and avers as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits that the tax in controversy is income tax for the calendar year 1933. Denies that the amount in controversy is as alleged in paragraph 3 of the petition.

4. I. Admits that the Commissioner disallowed an amount of $381.78 claimed as a credit on petitioner's income tax return. Denies that the Commissioner thereby erred, and denies all other allegations, if any, contained in subparagraph I of paragraph 4 of the petition.

II. Admits that the Commissioner determined that a dividend of $672.00 received by petitioner from the Great
45 Southern Lumber Company is taxable to the petitioner to the extent of 83.6544% thereof. Denies that the Commissioner thereby erred.

III. Admits that the Commissioner determined that petitioner's basis for the purpose of determining gain or loss on the sale during the calendar year 1933 of certain shares of the common stock of United States Steel Corporation and American Telephone & Telegraph Company, and of certain bonds of the Federal Land Banks of Louisville, Kentucky, and Columbus, Ohio, which had theretofore been acquired by the testamentary trustees for petitioner's benefit was the cost thereof to the trustees. Denies that the Commissioner thereby erred, and denies all other allegations contained in subparagraph III of paragraph 4 of the petition.

IV, V, VI, & VII. Denies all the allegations contained in subparagraphs IV, V, VI, and VII of paragraph 4 of the petition.

VIII. Admits that the Commissioner determined that on petitioner's sale during the calendar year 1933 of 10,000 shares of the capital stock of F. W. Woolworth Company, petitioner realized a capital gain of $318,128.92 instead of sustaining a capital loss of $278,854.33. Admits that in determining said capital gain the Commissioner applied the "first-in—first-out" rule. Denies that the Commissioner thereby erred, and denies all other allegations contained in subparagraph VIII of paragraph 4 of the petition.

IX. Admits that the Commissioner disallowed $5,250.00 claimed by petitioner on her return as an ordinary loss sustained on the sale during the calendar year 1933 of $50,000.00 face amount of New York City bonds (4½'s of 1957)
46 upon the ground that petitioner acquired substantially identical securities within thirty days before or after said sale. Denies that the Commissioner thereby erred, and denies all other allegations, if any, contained in subparagraph IX of paragraph 4 of the petition.

X. In the event it be determined that the Commissioner overstated petitioner's net income for 1933, respondent avers that petitioner's deduction for contributions should be reduced to an amount not exceeding 15% of the net income as redetermined.

5 I (a). Admits all the allegations contained in subparagraph I (a) of paragraph 5 of the petition.

I (b). Admits that on various dates during the year 1933 there became payable to the petitioner dividends in respect

of her shares of stock of F. W. Woolworth & Co., Ltd. Denies that said dividends amounted in the aggregate to $1,527.12.

I (c). Denies all the allegations contained in subparagraph I (c) of paragraph 5 of the petition.

I (d). Admits that in her income tax return for the calendar year 1933 filed with the Collector of Internal Revenue at Buffalo, New York, on or about March 15, 1934, petitioner included in gross income $1,527.12 as dividends received on the stock owned by her in F. W. Woolworth & Co., Ltd., and claimed a credit of $381.78 under item 38 of said return as tax withheld by the British government on said dividends. Denies all other allegations, if any, contained in subparagraph I (d) of paragraph 5 of the petition.

I (e). Admits that the Commissioner did not allow any part of the $381.78 as a credit. Denies all other allegations
47 contained in subparagraph I (e) of paragraph 5 of the petition, and avers that the Commissioner included only $1,145.34 in petitioner's gross income as dividends received from F. W. Woolworth & Co., Ltd.

II (f). Admits that on July 1, 1933, and for some time prior thereto, petitioner was the owner of 224 shares of the capital stock of Great Southern Lumber Company. Denies all other allegations contained in subparagraph II (f) of paragraph 5 of the petition.

II (g). Admits that in the year 1933, and for many years prior thereto, Great Southern Lumber Company was the owner of a large quantity of long leaf yellow pine timber situated in the northern part of the state of Louisiana, and owned and operated a sawmill in the city of Bogalusa, Louisiana. Denies all other allegations contained in subparagraph II (g) of paragraph 5 of the petition.

II (h), (i), (j), & (k). Denies all the allegations contained in subparagraphs II (h), (i), (j), and (k) of paragraph 5 of the petition.

II (l). Admits that on or about July 1, 1939, Great Southern Lumber Company paid in cash to the stockholders of record the sum of $3.00 per share. Denies all other allegations contained in subparagraph II (l) of paragraph 5 of the petition.

II (m). Admits that on July 1, 1933, the Great Southern Lumber Company paid $672.00 to the petitioner. Denies all other allegations contained in subparagraph II (m) of paragraph 5 of the petition.

48 II (n). Denies all the allegations contained in subparagraph II (n) of paragraph 5 of the petition.

II (o). Admits that the petitioner did not include any part of the amount so received in her taxable net income for the year

1933. Denies all other allegations contained in subparagraph II (o) of paragraph 5 of the petition.

II (p). Admits that the Commissioner included in petitioner's taxable net income for 1933 $562.16 of the total distribution of $672.00 from the Great Southern Lumber Company upon the ground that 83.6544% of the total was taxable to the petitioner. Denies all other allegations contained in subparagraph II (p) of paragraph 5 of the petition.

III (q). Admits that petitioner's father, Seymour H. Knox, died on May 16, 1915, leaving a last will and testament, by which a portion of the estate was devised and bequeathed in trust for the benefit of the petitioner. Denies all other allegations contained in subparagraph III (q) of paragraph 5 of the petition.

III (r). Admits that the trustees of the aforesaid trust acquired for the benefit of the petitioner the following securities on or about the dates and for the amounts hereinafter stated:

Date	Quantity	Security	Amount
Dec. 31, 1925	600 shares common	United States Steel Corporation	$50, 287. 50
Dec. 31, 1925	150 shares	American Telephone & Telegraph Company	21, 343. 75
July 31, 1926	25 shares	American Telephone & Telegraph Company	2, 568. 75

49 Admits that the trustees of the aforesaid trust acquired for the benefit of the petitioner the securities listed below:

Quantity	Security
$25,000.00 face amount	Federal Land Bank (Louisville) bonds (4½'s of 1953).
$8,000.00 face amount	Federal Land Bank (Columbus) bonds (4½'s of 1955).

Denies all other allegations contained in subparagraph III (r) of paragraph 5 of the petition.

III (s). Admits that on or about June 1, 1928, the trustees of the aforesaid trust received, with respect to said 175 shares of stock of American Telephone & Telegraph Company, one warrant for each share held. Admits that said warrants entitled the holder thereof to acquire one new share of the stock of American Telephone & Telegraph Company for $100.00 per share for each six warrants held.

III (t). Admits that on or about June 1, 1927, the trustees of the aforesaid trust received a 40% stock dividend with respect to said 600 shares of common stock of United States Steel Corporation. Denies all other allegations contained in subparagraph III (t) of paragraph 5 of the petition.

III(u). Admits that on or about July 5, 1928, the aforementioned securities were transferred from the trustees of the aforesaid trust to the petitioner. Denies all other allegations

contained in subparagraph III (u) of paragraph 5 of the petition.

50 III (v). Admits that on or about July 25, 1928, petitioner acquired 29 additional shares of the capital stock of American Telephone & Telegraph Company at an expenditure of $2,900.00 through the exercise of the aforementioned warrants. Denies all other allegations contained in subparagraph III (v) of paragraph 5 of the petition.

III (w). Admits that the petitioner sold the securities listed in subparagraph III (w) of paragraph 5 of the petition on the dates and for the amounts therein stated. Denies all other allegations contained in subparagraph III (w) of paragraph 5 of the petition.

III (x). Admits that in her income tax return for the calendar year 1933 petitioner reported that she sustained capital losses on the sales of the aforesaid securities in the amounts set out below:

Security	Amount reported as capital loss
840 shares of common stock United States Steel Corporation	$80,283.34
204 shares American Telephone & Telegraph Company	13,640.95
$25,000.00 face amount Federal Land Bank (Louisville) bonds	4,437.50
$8,000.00 face amount Federal Land Bank (Columbus) bonds	1,390.00

Denies all other allegations contained in subparagraph III (x) of paragraph 5 of the petition.

51 III (y). Admits that the Commissioner held that petitioner's basis for each of the aforesaid securities was less than that claimed by the petitioner; and as a result determined that the capital loss sustained on the sale of the United States Steel Corporation stock was $36,892.50 less than the amount claimed by the petitioner; that the capital loss sustained on the sale of the American Telephone & Telegraph Company stock was $9,293.60 less than the amount claimed by the petitioner; that the capital loss sustained on the sale of the Federal Land Bank bonds (Louisville) was $605.63 less than the amount claimed by the petitioner; and that the capital loss sustained on the sale of the Federal Land Bank bonds (Columbus) was $204.00 less than the amount claimed by the petitioner. Admits that the Commissioner held that the basis to petitioner for each of the aforesaid securities was the cost thereof to the aforementioned trustees. Denies all other allegations contained in subparagraph III (y) of paragraph 5 of the petition.

IV (z). Admits all the allegations contained in subparagraph IV (z) of paragraph 5 of the petition.

IV (aa). Admits that on or about July 1, 1921, the executors distributed certain shares of the capital stock of The Atchison,

Topeka & Sante Fe Railway Company pursuant to the terms of the last will and testament of petitioner's father, and transferred 100 of said shares to the testamentary trustees of a trust of which petitioner was the sole beneficiary. Admits that on July 1, 1921, the fair market value of said 100 shares of said stock was $8,050.00. Denies all other allegations contained in subparagraph IV (aa) of paragraph 5 of the petition.

IV (bb). Admits that on April 30, 1928, said testamentary trustees acquired by the exercise of stock rights 4 additional shares of said stock for $400.00.

52 IV (cc). Admits that upon petitioner's attaining the age of 28 years on July 5, 1928, the testamentary trustees transferred said 104 shares of stock of The Atchison, Topeka & Santa Fe Railway Company to petitioner. Denies all other allegations contained in subparagraph IV (cc) of paragraph 5 of the petition.

IV (dd). Admits that on December 20, 1933, petitioner sold 104 shares of The Atchison, Topeka & Sante Fe Railway Company stock for $5,509.94.

IV (ee). Admits that on her income tax return for the calendar year 1933 petitioner claimed $14,237.06 as a capital loss sustained on the sale of 104 shares of stock of The Atchison, Topeka & Sante Fe Railway Company. Denies all other allegations contained in subparagraph IV (ee) of paragraph 5 of the petition.

IV (ff). Admits that the Commissioner determined that petitioner sustained a capital loss of only $2,940.06 on the sale of said stock, the same being the difference of the fair market value of the 100 shares on July 1, 1921, plus the cost to the trustees of the 4 shares later acquired by them, and the sale price of $5,509.94. Denies all other allegations contained in subparagraph IV (ff) of paragraph 5 of the petition.

V (gg). Admits that on or about July 1, 1921, petitioner's father's executors distributed the securities listed in subparagraph V (gg) of paragraph 5 of the petition pursuant to the terms of the last will and testament of petitioner's father, and transferred said securities to the testamentary trustees of a trust of which petitioner was the sole beneficiary. Admits that on July 1, 1921,

53 the value of the shares of common stock of Southern Pacific Railroad Company, Hotels Statler Company, Inc., and Union Pacific Railroad Company were as set out in said subparagraph V (gg) of paragraph 5 of the petition. Admits that the value of the $10,000.00 face amount of City of New York corporate stock issued for water supply purposes (4's of 1959) did not exceed $9,650.00, and avers that the value of said City of New York corporate stock was $7,900.00.

V (hh). Admits that upon petitioner's attaining the age of 28 years on July 5, 1928, the securities listed in subparagraph V (hh) of paragraph 5 of the petition were transferred from the testamentary trustees to the petitioner. Denies all other allegations contained in subparagraph V (hh) of paragraph 5 of the petition.

V (ii). Admits that on or about December 28, 1929, petitioner received on the stock of Hotels Statler Company, Inc., a 100% stock dividend of 160 shares. Denies all other allegations contained in subparagraph V (ii) of paragraph 5 of the petition.

V (jj). Admits that petitioner sold securities in the amounts, on the dates, and for the sales prices listed in subparagraph V (jj) of paragraph 5 of the petition.

V (kk). Admits that in her income tax return for the calendar year 1933 petitioner claimed capital losses on the above-mentioned sales in the amounts listed in subparagraph V (kk) of paragraph 5 of the petition. Denies all other allegations contained in subparagraph V (ii) of paragraph 5 of the petition.

V (ll). Admits that the Commissioner held that petitioner's capital losses on the sales of the above-mentioned
54 securities are the differences between the values set out in subparagraph V (gg) of paragraph 5 of the petition and the sales prices set out in subparagraph V (jj) of paragraph 5 of the petition, and as a result determined that the capital loss sustained on the sale of the City of New York corporate stock (4's of 1959) was $293.75 less than the amount claimed by petitioner; that the capital loss sustained on the sale of the Southern Pacific Railroad Company stock was $5,984.37 less than the amount claimed by petitioner; that the capital loss sustained on the sale of the Hotels Statler Company, Inc., stock was $4,000.00 less than the amount claimed by the petitioner; and that the capital loss sustained on the sale of the Union Pacific Railroad Company stock was $7,712.50 less than the amount claimed by the petitioner. Avers that in determining the capital loss sustained on the sale of the $10,000.00 face amount of City of New York corporate stock the Commissioner erred in favor of the petitioner by using as the fair market value on July 1, 1921, of said corporate stock the sum of $9,650.00 rather than the sum of $7,900.00, the capital loss determined by the Commissioner being thereby overstated by the sum of $1,750.00. Denies all other allegations contained in subparagraph V (ll) of paragraph 5 of the petition.

VI (mm). Admits that on or about July 1, 1921, petitioner's father's executors distributed $50,000.00 face amount of the bonds of the City of Philadelphia (4's of 1946), $10,000.00 face amount

of the bonds of the City of Auburn, New York (4¾'s of 1933), and $20,000.00 face amount of the bonds of the City of Rochester, New York (4½'s of 1933), pursuant to the terms of the last will and testament of petitioner's father, and transferred said bonds to the testamentary trustees of a trust of which
55 petitioner was the sole beneficiary. Denies all other allegations contained in subparagraph VI (mm) of paragraph 5 of the petition.

VI (nn). Admits that the Commissioner determined that on the date of said distribution the fair market value of the City of Philadelphia bonds was $50,687.50, the fair market value of the City of Auburn bonds was $10,227.83, and the fair market value of the City of Rochester bonds was $20,082.50.

VI (oo). Admits that on July 5, 1928, the aforesaid bonds were transferred from the testamentary trustees to the petitioner. Denies all other allegations contained in subparagraph VI (oo) of paragraph 5 of the petition.

VI (pp) & (qq). Admits all the allegations contained in subparagraphs VI (pp) and (qq) of paragraph 5 of the petition.

VI (rr). Admits that in her income tax return for the calendar year 1933 petitioner claimed $11,259.59 as a capital loss sustained on the sale of said City of Philadelphia bonds, and claimed $227.83 and $548.00 as capital losses sustained on the redemption of the City of Auburn and City of Rochester bonds, respectively. Denies all other allegations contained in subparagraph VI (rr) of paragraph 5 of the petition.

VI (ss). Admits that the Commissioner determined that a capital loss of only $7,757.09 was sustained on the sale of the City of Philadelphia bonds; determined that the loss of $227.83 on the redemption of the City of Auburn bonds was an ordinary and not a capital loss; and determined that the loss
56 sustained on the redemption of the City of Rochester bonds was only $82.50 and was an ordinary loss instead of a capital loss. Denies all other allegations contained in subparagraph VI (ss) of paragraph 5 of the petition.

VII (tt). Admits that on or prior to June 15, 1925, the trustees of the aforesaid testamentary trust acquired for petitioner's benefit 214 shares of the common stock of Niagara, Lockport & Ontario Power Company. Denies all other allegations contained in subparagraph VII (tt) of paragraph 5 of the petition.

VII (uu). Admits all the allegations contained in subparagraph VI (uu) of paragraph 5 of the petition.

VII (vv). Admits that on August 31, 1925, the testamentary trustees purchased for $1,202.50 32½ additional shares of the common stock of Buffalo, Niagara & Eastern Power Corporation.

VII (ww) & (xx). Admits all the allegations contained in subparagraphs VII (ww) and (xx) of paragraph 5 of the petition.

VII (yy). Admits that upon petitioner's attaining the age of 28 years on July 5, 1928, the testamentary trustees transferred the 300 shares of preferred stock, 300 shares of common stock, and 75 shares of Class "A" common stock of Buffalo, Niagara & Eastern Power Corporation to petitioner. Denies all other allegations contained in subparagraph VII (yy) of paragraph 5 of the petition.

VII (zz). Admits that in 1929 petitioner exchanged said 300 shares of common stock of Buffalo, Niagara & Eastern Power Corporation for 1,200 shares of common capital
57 stock of Niagara Hudson Power Corporation and 300 Niagara Hudson Power Corporation option warrants. Denies all other allegations contained in subparagraph VII (zz) of paragraph 5 of the petition.

VII (aaa). Admits that in 1929 petitioner exchanged the 75 shares of Class "A" common stock of Buffalo, Niagara & Eastern Power Corporation for 300 shares of the common capital stock of Niagara Hudson Power Corporation and 75 Class "A" option warrants of said Niagara Hudson Power Corporation. Denies all other allegations contained in subparagraph VII (aaa) of paragraph 5 of the petition.

VII (bbb). Admits that the exchanges mentioned in subparagraphs VII (zz) and (aaa) above were transactions governed by Sec. 112 (b) (3) or (b) (5) of the Revenue Act of 1928, and Sec. 113 (a) (6) of the Revenue Act of 1932; and that on the date said exchanges were made, the stock and warrants received each had a substantial fair market value. Denies all other allegations contained in subparagraph VII (bbb) of paragraph 5 of the petition.

VII (ccc). Admits all the allegations contained in subparagraph VII (ccc) of paragraph 5 of the petition.

VII (ddd). Admits that on December 20, 1933, petitioner sold said 500 shares of the common stock of Niagara Hudson Power Corporation for $2,506.75, and said 125 Class "A" option warrants of said corporation for $40.24, and said 300 shares of preferred stock of Buffalo, Niagara & Eastern Power Corporation for $4,800.50.

VII (eee). Admits that in her income tax return for the calendar year 1933, which was filed on or about March 15,
58 1934, with the Collector of Internal Revenue at Buffalo, New York, petitioner claimed $12,340.51 as capital losses sustained on the sale of the 500 shares of common stock and

125 Class "A" option warrants of Niagara Hudson Power Corporation. Admits that in said income tax return petitioner claimed $3,037.00 as a capital loss sustained on the sale of the 300 shares of preferred stock of Buffalo, Niagara & Eastern Power Corporation. Denies all other allegations contained in subparagraph VII (eee) of paragraph 5 of the petition.

VII (fff). Admits that the Commissioner determined that the capital loss sustained by petitioner on the sale of the 500 shares of common stock and 125 Class "A" option warrants of Niagara Hudson Power Corporation was only $3,035.78. Admits that the Commissioner determined that petitioner realized a capital gain of $2,363.46 on the sale of the 300 shares of preferred stock of Buffalo, Niagara & Eastern Power Corporation. Admits that the basis determined by the Commissioner for the 500 shares of common stock and 125 Class "A" option warrants of Niagara Hudson Power Corporation was $5,582.77. Denies all other allegations contained in subparagraph VII (fff) of paragraph 5 of the petition.

VII (ggg). Admits that the basis for the 300 shares of preferred stock of Buffalo, Niagara & Eastern Power Corporation determined by the Commissioner was $2,437.04. Denies all other allegations contained in subparagraph VII (ggg) of paragraph 5 of the petition.

VIII (hhh). Admits that on or about July 1, 1921, petitioner's father's executors distributed 4,964 shares of the
59 common stock of F. W. Woolworth Company, having a par value of $100.00 per share, pursuant to the last will and testament of petitioner's father, and transferred said shares to the testamentary trustees of a trust of which petitioner was the sole beneficiary. Admits that on July 1, 1921, the fair market value of said shares of stock was $110.00 per share, or an aggregate fair market value of $546,040.00. Denies all other allegations contained in subparagraph VIII (hhh) of paragraph 5 of the petition.

VIII (iii). Admits all the allegations contained in subparagraph VIII (iii) of paragraph 5 of the petition.

VIII (jjj). Denies all the allegations contained in subparagraph VIII (jjj) of paragraph 5 of the petition.

VIII (kkk). Admits all the allegations contained in subparagraph VIII (kkk) of paragraph 5 of the petition.

VIII (lll). Admits that upon petitioner's attaining the age of 28 years on July 5, 1928, 15,000 shares of F. W. Woolworth Company stock were transferred from the testamentary trustees to petitioner. Denies all other allegations contained in subparagraph VIII (lll) of paragraph 5 of the petition.

VIII (mmm). Admits that on various dates petitioner acquired 1,000 shares of F. W. Woolworth Company stock, having a par value of $25.00 each. Admits that petitioner expended in connection with the acquisition of this staock the sum of $118,691.58.

VIII (nnn). Admits that on or about June 24, 1929, after proper corporate action further reducing the par value of
60 the corporation's shares from $25.00 each to $10.00 each, petitioner's holdings of 16,000 shares of $25.00 par value common stock of F. W. Woolworth Company were converted into 40,000 shares of $10.00 par value stock of said company. Denies all other allegations contained in subparagraph VIII (nnn) of paragraph 5 of the petition.

VIII (ooo). Admits that on various dates in December, 1933, petitioner sold 10,000 shares of F. W. Woolworth Company stock for an aggregatae amount of $391,462.25. Denies all other allegations contained in subparagraph VIII (ooo) of paragraph 5 of the petition.

VIII (ppp). Admits that in her income tax return for the calendar year 1933 petitioner claimed $278,854.33 as a capital loss sustained on the sale of said stock. Denies all other allegations contained in subparagraph VIII (ppp) of paragraph 5 of the petition.

VIII (qqq). Admits that the Commissioner disallowed said item and determined that petitioner realized a capital gain of $318,128.92 upon the sale of said $10,000 shares of stock of F. W. Woolworth Company. Admits that the Commissioner held that the identity of petitioner's shares of stock of F. W. Woolworth Company was lost; that the "first in-first out" rule must be applied; that the 10,000 shares sold in December, 1933, must be deemed to have been out of the lot of 37,500 shares of stock transferred on July 5, 1928, from the testamentary trustees to the petitioner; and that petitioner's basis for the shares sold is the fair market value on July 1, 1921, of 666⅔ of F. W. Woolworth Company stock. Denies all other allegations contained in subparagraph VIII (qqq) of paragraph 5 of the petition.

61 IX (rrr). Admits that prior to December 1933, petitioner purchased $50,000.00 face amount of the corporate stock of the City of New York (4½'s of 1957). Admits that said bonds (corporate stock) were registered securities. Denies all other allegations contained in subparagraph IX (rrr) of paragraph 5 of the petition.

IX (sss). Admits that in December 1933, petitioner sold all of said bonds. Denies all other allegations contained in subparagraph IX (sss) of paragraph 5 of the petition.

IX (ttt). Admits that on or about the same date petitioner purchased corporate stock of the City of New York (4½'s of 1957). Denies all other allegations contained in subparagraph IX (ttt) of paragraph 5 of the petition.

IX (uuu). Admits that in her income tax return for the calendar year 1933 petitioner claimed $5,250.00 as an ordinary loss sustained on the sale of said corporate stock of the City of New York (4½'s due 1957).

IX (vvv). Admits that the Commissioner disallowed all of said deduction upon the ground that petitioner acquired substantially identical securities within thirty days before or after said sale. Denies all other allegations contained in subparagraph IX (vvv) of paragraph 5 of the petition.

(www). Respondent avers that in determining the deficiency for 1933 the Commissioner allowed petitioner a deduction for contributions in the amount of $3,321.00.

Denies generally and specifically each and every allegation contained in the taxpayer's petition not hereinbefore admitted, qualified or denied.

62 6. In further defense of the Commissioner's determination, and in support of an alternative claim to an increased deficiency for the year 1933, respondent relies upon the following additional facts:

(a) With respect to the securities sold by petitioner in the year 1933, which were owned by petitioner's father on the date of his death or derived from securities owned by petitioner's father on the date of his death, such securities were acquired by petitioner by transfer in trust before January 1, 1921; and the bases to petitioner of the securities so acquired were the fair market values thereof on May 16, 1915, as provided in Sec. 113 (a) (4) of the Revenue Act of 1932.

(b) On information and belief, the fair market values of said securities owned by petitioner's father on the date of his death were less than the amounts used as bases by the Commissioner in making his determination, and were less than the respective bases claimed by the petitioner in this proceeding.

(c) With respect to securities sold by petitioner in 1933, which were purchased by the executors or which were derived from securities purchased by the executors, such securities were acquired by petitioner by purchase, and the bases to petitioner of the securities so acquired were the respective costs thereof, viz, the amounts paid by the executors.

(d) On information and belief, the respective costs of such securities were less than the bases used by the Commissioner in his determination, and were less than the bases claimed by the petitioner in this proceeding.

Wherefore, it is prayed that the Board redetermine the
63 correct amount of the deficiency involved in this proceeding to be equal to the amount determined by the Commissioner, viz, $86,937.47 plus any and all additional amounts which may result from the correction of any error made by the Commissioner. The Commissioner hereby makes claim for the increased deficiency resulting from such redetermination.

(Signed) HERMAN OLIPHANT,
Herman Oliphant
General Counsel for the Department of the Treasury,
Attorney for Respondent.

Of Counsel:
F. R. SHEARER,
E. L. UPDIKE,
Special Attorneys for the
Bureau of Internal Revenue.

64 Before United States Board of Tax Appeals

Docket No. 84639

[Same Title]

Reply

Filed Sept. 3, 1936

The petitioner, by her attorney, Ralph M. Andrews, in reply to respondent's answer herein, admits and denies the affirmative allegations thereof as follows:

4 X. Admits that the deduction allowable to petitioner on account of contributions during the calendar year 1933 should be computed in accordance with the provisions of paragraph 23 (n) of the Revenue Act of 1932. Denies each and every other allegation contained in paragraph "4 X" of respondent's answer.

5 I (e). Admits that the Commissioner of Internal Revenue has included an amount of $1,145.34 in petitioner's gross income for the calendar year 1933 as dividends received from F. W. Woolworth & Co., Ltd.

5 V (gg). Denies that the $10,000 face amount of corporate stock of the City of New York issued for water supply purposes, 4's of 1959, referred to in paragraph 5 V (gg) of respondent's answer, had a fair market value of $7,900 on July 1, 1921 and alleges that said stock had a fair market value on said date of not less than $8,025.

5 V (ll). Denies that the $10,000 face amount of corporate stock of the City of New York issued for water supply purposes, 4's of 1959, referred to in paragraph "5 V (ll)" of the respondent's answer had a fair market value of July 1, 1921 of only $7,900 and alleges that said corporate stock had a value of not less than $8,025 on said date. Denies all other allegations contained in said paragraph.

6. (a). Denies all of the allegations contained in paragraph "6 (a)" of respondent's answer.

6 (b). Denies that the fair market values of all the securities owned by petitioner's father on the date of his death were less that the amounts used as bases by the Commissioner in making his determination and less than the respective bases claimed by the petitioner in this proceeding.

6 (c). Denies all of the allegations contained in paragraph "6 (c)" of respondent's answer.

6 (d). Denies all of the allegations contained in paragraph "6 (d)" of respondent's answer.

Denies generally and specifically each and every allegation contained in respondent's answer not hereinbefore admitted, qualified, or denied.

Wherefore, petitioner prays that the Board may hear this proceeding and determine that the respondent erred in the respects stated in paragraph "4" of the petition, that the claims for an additional deficiency made in respondent's answer are without merit and should be denied and that petitioner is entitled to the relief prayed for in paragraph "6" of the petition.

(S) RALPH M. ANDREWS,
Counsel for Petitioner,
Office and Post Office Address, 1330 Main Trust Bldg., 239 Main Street, Buffalo, New York.

66 [Duly sworn to by Marjorie K. Campbell; jurat omitted in printing.]

67 Before United States Board of Tax Appeals

Docket No. 84639

[Same title.]

Amended petition

Filed at Hearing, Dec. 14, 1938

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency dated February 27,

1936 (IT:AR:A-2 MEW:90D), and as a basis of her proceeding alleges as follows:

1. At all the times hereinafter mentioned petitioner was and still is a resident of the Village of East Aurora, County of Erie and State of New York.

2. The notice of deficiency (a copy of which is attached hereto marked "Exhibit A") was mailed to the petitioner on February 27, 1936.

3. The tax in controversy is an income tax for the calendar year 1933, and amounts to the sum of $86,937.47.

4. The determination of tax set forth in said deficiency letter is based upon the following errors:

I

The disallowance by the Commisisoner of Internal Revenue of a credit of $381.78 against petitioner's income tax
68 on account of British income taxes withheld from dividends paid petitioner by an incorporated English company.

II

The determination by the Commissioner of Internal Revenue that a dividend of $672.00 received by petitioner from the Great Southern Lumber Company is taxable to petitioner to the extent of 83.6544% thereof.

III

The determination by the Commissioner of Internal Revenue that, for the purpose of determining gain or loss, petitioner's cost basis on the sale during the calendar year 1933 of certain shares of the common stock of United States Steel Corporation and American Telephone & Telegraph Company, and of certain bonds of the Federal Land Banks of Louisville and Columbia, which petitioner had acquired from her father's testamentary trustees, and which had theretofore been purchased by said trustees, was the cost of said securities to said trustees.

IV

The determination by the Commissioner of Internal Revenue that, for the purpose of determining gain or loss, petitioner's cost basis on the sale during the calendar year 1933 of certain shares of the capital stock of The Atchison, Topeka & Santa Fe Railway Company, which petitioner had acquired from her father's testamentary trustees, was as follows:

i. As to so much thereof as was purchased by her father
69 prior to his death, the fair market value of said securities on the date of their transfer by her father's executors to her father's testamentary trustees.

ii. As to so much thereof as was purchased by her father's testamentary trustees, the cost thereof to said trustees.

V

The determination by the Commissioner of Internal Revenue that, for the purpose of determining gain or loss, petitioner's cost basis on the sale during the calendar year 1933 of certain corporate stock of the City of New York issued for water supply purposes (4's of 1959) and of certain shares of the capital stock of Southern Pacific Railroad Company, Hotels Statler Company, Inc., and Union Pacific Railroad Company, which petitioner had acquired from her father's testamentary trustees, and which had been purchased by her father prior to his death, was the fair market value of said securities on the date of the transfer thereof by her father's executors to her father's testamentary trustees.

VI

The determination by the Commissioner of Internal Revenue that, for the purpose of determining gain or loss, petitioner's cost basis on the sale during the calendar year 1933 of certain bonds of the City of Philadelphia, Pennsylvania, and on the maturity during said year of certain bonds of the Cities of Auburn and Rochester, New York, which petitioner had acquired from her father's testamentary trustees, and which had theretofore been purchased by her father's executors, was the fair market value of said securities on the date of the transfer thereof by her father's executors to her father's testamentary trustees.

70 VII

The determination by the Commissioner of Internal Revenue that, for the purpose of determining gain or loss, petitioner's cost basis on the sale during the calendar year 1933 of certain shares of the $25.00 par value preferred stock of Buffalo, Niagara & Eastern Power Corporation which petitioner had acquired from her father's testamentary trustees, and of certain shares of the common stock and warrants of Niagara Hudson Power Corporation which were derived from stock which petitioner had acquired from her father's testamentary trustees, was as follows:

i. As to so much thereof as was purchased by her father's executors, the cost thereof to said executors.

ii. As to so much thereof as was purchased by her father's testamentary trustees, the cost thereof to said trustees.

VIII

The determination by the Commissioner of Internal Revenue that on petitioner's sale during the calendar year 1933 of 10,000 shares of the capital stock of F. W. Woolworth Company, petitioner derived a capital gain of $318,128.92 instead of sustaining a capital loss of $278,854.33, upon the grounds:

i. That in the application of the "first-in—first-out" rule, the order of acquisition should be determined by employing the dates as of which petitioner's cost basis is ascertained rather than the dates on which petitioner physically acquired the securities; and that for the purpose of applying said rule all
71 of the stock sold must be deemed to be out of lots acquired by petitioner from her father's testamentary trustees; and

ii. That petitioner's cost basis in stock distributed to her by her father's testamentary trustees, and which had theretofore been purchased by her father prior to his death, is the fair market value of said stock on July 1, 1921, the date of the transfer thereof by her father's executors to her father's testamentary trustees.

IX

The disallowance by the Commissioner of Internal Revenue of an ordinary loss of $5,250.00 sustained by petitioner on the sale during the calendar year 1933 of $50,000.00 face amount of New York City corporate stock (4½'s of 1957), upon the ground that petitioner acquired substantially identical securities in the same amount within thirty days before or after said sale.

5. The facts upon which petitioner relies as the basis of this proceeding are as follows:

I

(a) Throughout the year 1933 petitioner was the owner, among other things, of certain shares of stock of F. W. Woolworth & Co., Ltd., a British incorporated company.

(b) On various dates during said year 1933 there became payable to petitioner, dividends in respect of her said shares in said F. W. Woolworth & Co., Ltd., in the aggregate amount of $1,527.12.

72 (c) Upon information and belief, said dividends were subject to a British income tax under the English law, and the payor company, in each case, is required to withhold from the dividends paid the amount of said tax. The amount of said

tax withheld on petitioner's dividends from the above source was $381.78 in American funds.

(d) In her income tax return for the calendar year 1933, filed with the Collector of Internal Revenue at Buffalo, New York, on or about March 15, 1934, petitioner included in gross income the gross dividend payable to her of $1,527.12, and inserted in item 38 of her said return for that year the amount of $381.78, the tax withheld.

(e) Respondent, in his deficiency letter, among other things, while allowing a deduction from gross income on account of said foreign tax of $381.78, has failed to allow any part of said amount as a credit against petitioner's alleged deficiency.

II

(f) On July 1, 1933, and for some time prior thereto petitioner was the owner of 224 shares of the capital stock of Great Southern Lumber Company, a Pennsylvania corporation with its principal office in the City of Harrisburg, Pennsylvania.

(g) Said Great Southern Lumber Company, in the year 1933, and for many years prior thereto, was the owner of a large quantity of long leaf yellow pine timber situated in the northern part of the State of Louisiana, and owned and operated a saw-
73 mill in the City of Bogalusa, Louisiana. In the year 1933 the corporation's land, to a very large extent, had been cut over and stripped of its stand, and in that year the corporation was approaching the end of its timber operation. During said year and for several years prior thereto the corporation had taken steps toward gradual liquidation.

(h) Prior to January 21, 1933, the Great Southern Lumber Company had an authorized issue of capital stock consisting of 160,000 shares of the par value of $80.00 each, all of which said shares were common stock and amounted in the aggregate to $12,800,000.00.

(i) At a meeting of the board of directors of the Great Southern Lumber Company held January 21, 1933, a meeting of the stockholders of said corporation was called to be held on April 26, 1933, for the purpose of voting upon a proposition for a reduction of the capital stock of said corporation from $12,800,000.00 to $12,320,000.00, to be effected by a reduction of the par value of the corporation's shares from $80.00 to $77.00 per share. Said meeting of the stockholders was duly held on April 26, 1933, and the following resolutions were duly adopted:

"Resolved, That the capital of Great Southern Lumber Company be authorized to be reduced from $12,800,000.00 to $12,-

320,000.00, the same to be effected by a reduction in the par value of shares;

"Resolved, That the actual reduction in the said corporation's capital stock shall be made by its Board of Directors at such time as the said Board, in its discretion, shall determine."

* * * * *

74 "Resolved, That the par value of shares of capital stock of Great Southern Lumber Company be, and the same are, hereby authorized to be reduced from $80.00 per share to $77.00 per share, so that the capital stock of the company thereafter shall consist of 160,000 shares with a par value of $77.00 aggregating, at par, $12,320,000.00;

"Resolved, That the actual reduction in the par value of said shares of said corporation shall be made by its Board of Directors at such time as the said board, in its discretion, shall determine."

(j) The Judges' Returns of Election to reduce the capital stock and to change the par value of the corporation's shares were thereafter duly filed in the office of the Secretary of the Commonwealth of Pennsylvania.

(k) At a meeting of the board of directors of said Great Southern Lumber Company held on June 27, 1933, the following resolution was duly adopted:

"Resolved: That the capital stock of this Company be, and the same is hereby actually reduced from $12,800,000.00 to $12,320,000.00;

"Resolved: That the par value of shares of capital stock of this company be, and the same is hereby reduced from $80.00 per share to $77.00 per share."

(l) Thereafter, and in accordance with statutory proceedings for the reduction of capital stock and the reduction of par value of its shares, and as required by the laws of Pennsylvania,

75 said Great Southern Lumber Company duly paid to its stockholders of record the sum of $3.00 per share, charging said distribution to its capital stock account, and reducing its authorized and outstanding issue of capital stock accordingly. The par value of each certificate of outstanding capital stock of the corporation was changed from $80.00 per share to $77.00 per share.

(m) Petitioner duly deposited certificates representing said 224 shares of the capital stock of said Great Southern Lumber Company, and on July 1, 1933, a partial liquidating dividend of $672.00 was duly paid to petitioner.

(n) Thereupon there were returned to petitioner certificates representing said 224 shares, having a par value of $77.00 per

share. Petitioner credited the entire amount of said distribution to her personal capital account.

(o) The amount distributed by said Great Southern Lumber Company to petitioner, as aforesaid, was less than the fair market value of said stock on July 10, 1928, the date on which said stock was distributed to petitioner by her father's testamentary trustees, and was less than the fair market value of said stock on July 1, 1921, the date on which said stock was transferred of record and delivered by her father's executors to his testamentary trustees, as adjusted on account of intervening distributions from capital, and petitioner did not include any part of the amount so received in her taxable net income for the year 1933.

(p) The Commissioner of Internal Revenue, in his final determination, has included in petitioner's taxable net income an amount of $562.16 of the total distribution of $672.00
76 from said Great Southern Lumber Company, above described, upon the ground that 83.6544% of said distribution to petitioner was taxable to her.

III

(q) Petitioner's father, Seymour H. Knox, died on May 16, 1915, leaving a last will and testament, by the provisions of which the testator, after directing payment of his debts and the making of certain specific bequests, provided, in part, as follows, with respect to the disposition of his residuary estate:

"(D) Twenty (20) per cent of all the rest, residue, and remainder of my said estate (not including, however, the shares of capital stock of the six corporations mentioned in the first paragraph of this Article Twenty-first) I give, devise and bequeath to my brother, Henry D. Knox, and Walter P. Cooke, both of the City of Buffalo, in trust nevertheless, for the following uses and purposes, to wit:

"To receive, hold and, from time to time, invest and reinvest the same, and to collect the rents, income, issues, and profits on the property from time to time constituting such trust fund and to pay over so much of the net income arising therefrom, as to my said trustees shall seem wise and proper toward the support, maintenance and education of my daughter, Marjorie Knox, until she shall arrive at the age of twenty-one (21) years, and to accumulate the balance of the income during her minority for her benefit, and to pay over the accumulated income to her when she shall arrive at the age of twenty-one (21) years, and thereafter to pay over the entire net income to my said

77 daughter, Marjorie Knox, until she shall arrive at the age of twenty-eight (28) years, at which time, I give, devise and bequeath to my said daughter, Marjorie Knox, one-half (½) of the property then constituting said trust fund and I direct my said trustees to pay over the net income on the remaining one-half (½) of said trust fund until she shall arrive at the age of thirty-five (35) years, at which time I give, devise and bequeath the remaining part of said trust fund to my said daughter, Marjorie Knox, and to her heirs and assigns forever.

"In the event that my said daughter, Marjorie Knox, shall die before reaching the age of thirty-five (35) years, I give, devise and bequeath any part or portion of said trust fund, which has not then been paid over to her, or to the possession of which at the time of her death she was not entitled, unto the issue of said Marjorie Knox, if any, surviving her, to be divided among them, share and share alike. And in case there be no issue her surviving, then I give, devise and bequeath said trust fund unto her heirs."

(r) Pursuant to authority vested in them by the provisions of petitioner's father's will quoted above at paragraph III (q), said testamentary trustees bought the following securities on or about the dates and for the amounts hereinafter stated:

Date	Quantity	Security	Amount
Dec. 31, 1925	600 shares common	United States Steel Corporation	$80,287.50
Dec. 31, 1925	150 shares	American Telephone & Telegraph Company.	21,343.75
78 July 31, 1926	25 shares	American Telephone & Telegraph Company.	2,568.75
May 31, 1923	$25,000.00 face amount	Federal Land Bank bonds (Louisville) (4½'s of 1953/33).	25,125.00
May 31, 1925	$8,000.00 face amount	Federal Land Bank bonds (Columbia) (4½'s of 1955/35).	8,220.00

(s) On or about June 1, 1928, said testamentary trustees of petitioner's father's estate received, with respect to said 175 shares of the stock of American Telephone & Telegraph Company, one warrant for each share held. Said warrants entitled the holder thereof to acquire one new share of the stock of said American Telephone & Telegraph Company at $100.00 per share for each six warrants held.

(t) On or about June 1, 1927, said testamentary trustees received a 40% stock dividend with respect to said 600 shares of the common stock of United States Steel Corporation, increasing their holdings therein to 840 shares.

(u) On or about July 10, 1928, said testamentary trustees distributed to petitioner, among other things, the following securi-

ties which have been heretofore referred to, and which, on said date, had a fair market value as hereinafter stated:

Quantity	Security	Unit price	Value
840 shares common	United States Steel Corporation	$139.50	$117,180.00
175 shares	American Telephone & Telegraph Company	176.5625	30,898.44
79 175 warrants	American Telephone & Telegraph Company	12.125	2,121.88
$25,000.00 face amount.	Federal Land Bank bonds (Louisville) (4½'s of 1953/33).	100.125	25,031.25
$8,000.00 face amount	Federal Land Bank bonds (Columbia) (4½'s of 1955/35).	100.25	8,020.00

(v) On or about July 25, 1928, petitioner exercised the rights which she had received from said testamentary trustees, and upon the exercise thereof acquired 29 additional shares of the capital stock of said American Telephone & Telegraph Company at an expenditure of $2,998.60.

(w) During the calendar year 1933 petitioner duly sold the above-described securities on the dates and in the amounts hereinafter stated:

Date	Quantity	Security	Sale price
Dec. 1, 1933	840 shares common	United States Steel Corporation.	$36,896.66
Dec. 20, 1933	204 shares	American Telephone & Telegraph Company.	22,465.15
Dec. 21, 1933	$25,000.00 face amount	Federal Land Bank bonds (Louisville) (4½'s of 1953/33).	20,593.75
Dec. 27, 1933	$8,000.00 face amount	Federal Land Bank bonds (Columbia) (4½'s of 1955/35).	6,630.00

80 (x) In her return for the calendar year 1933 petitioner reported capital losses on the sales of the above securities in the following amounts, and computed as follows:

Quantity	Security	Fiar market value July 10, 1928	Sale price	Capital loss
840 shares common	United States Steel Corporation.	$117,180.00	$36,896.66	$80,283.34
204 shares	American Telephone & Telegraph Company.			
Value of:				
175 shares $31,062.50				
175 warrants. 2,143.60				
Purchase price of 29 shares 2,900.00				
		36,106.10	22,465.15	13,640.95
$25,000.00 face amount	Federal Land Bank bonds (Louisville) (4½'s of 1953/33).	25,031.25	20,593.75	4,437.50
$8,000.00 face amount	Federal Land Bank bonds (Columbia) (4½'s of 1955/35.)	8,020.00	6,630.00	1,390.00

(y) The Commissioner of Internal Revenue, in his final determination, has reduced petitioner's cost basis in the above

described securities, and has reduced the capital losses claimed by petitioner on the sales thereof in the following amounts:

81 United States Steel Corporation	$36,892.50
American Telephone & Telegraph Company	9,293.60
Federal Land Bank bonds (Louisville)	605.63
Federal Land Bank bonds (Columbia)	204.00

The Commissioner of Internal Revenue has made said reductions upon the ground that petitioner's cost basis in the above securities is the cost thereof to her father's testamentary trustees, and in determining the said trustees' cost of the Federal Land Bank bonds of Louisville and Columbia has employed said trustees' average cost in those and certain other bonds.

IV

(z) On the date of the death of petitioner's father, May 16, 1915, the latter was the owner of 500 shares of the common capital stock of The Atchison, Topeka & Santa Fe Railway Company, which had a fair market value on that date of and was appraised at $49,625.00.

(a) Pursuant to the provisions of petitioner's father's will above quoted at paragraph III (q), 20% of said shares of stock of The Atchison, Topeka & Santa Fe Railway Company, or 100 shares, was transferred of record and delivered by the executors to the testamentary trustees for petitioner on July 1, 1921. Said stock had a fair market value on that date of $80.50 per share, or a total value of $8,050.00.

(bb) Thereafter and on April 30, 1928, said testamentary trustees purchased 4 additional shares of said stock for $400.00.

82 (cc) Upon petitioner's attaining the age of 28 years on July 10, 1928, said testamentary trustees distributed said 104 shares of stock of The Atchison, Topeka & Santa Fe Railway Company to petitioner. On that date said shares had a fair market value of $188.50 per share, or a total value of $19,604.00.

(dd) On December 20, 1933, petitioner duly sold said 104 shares, receiving therefor $5,509.94.

(ee) In her return for the calendar year 1933 petitioner claimed a capital loss of $14,237.06 on the sale of said 104 shares of stock of The Atchison, Topeka & Santa Fe Railway Company.

(ff) The Commissioner of Internal Revenue, in his final determination has determined that the petitioner's loss on said sale was $2,940.06, being the difference between the fair market value of 100 of said shares on the date they were transferred of record and delivered to said testamentary trustees by said executors, plus the

trustees' cost of the 4 shares purchased by them in 1928, and the sale price thereof.

V

(gg) On July 1, 1921, the executors of petitioner's father's estate transferred of record and delivered to the testamentary trustees for petitioner, the following securities which on that date, had a fair market value as follows:

83 Quantity	Security	Unit price	Value
$10,000.00 face amount	City of New York corporate stock issued for water supply purposes (4's of 1959).	$96.50	$9,650.00
125 shares	Southern Pacific Railroad Company	74.375	9,296.88
160 shares	Hotels Statler Company, Inc.	75.00	12,000.00
100 shares	Union Pacific Railroad Company	117.875	11,787.50

(hh) Upon petitioner's attaining the age of 28 years on July 10, 1928, the above described securities were distributed to her by her father's testamentary trustees. On that date said securities had fair market values as follows:

Quantity	Security	Unit price	Value
$10,000.00 face amount	City of New York corporate stock issued for water supply purposes (4's of 1959).	$99.25	$9,925.00
125 shares	Southern Pacific Railroad Company	120.25	15,031.25
160 shares	Hotels Statler Company, Inc.	125.00	20,000.00
100 shares	Union Pacific Railroad Company	194.9375	19,493.75

84 (ii) Thereafter and on December 28, 1929, a 100% stock dividend of 160 shares was declared and received by petitioner on her holdings of the stock of Hotels Statler Company, Inc., bringing her total holdings of said stock to 320 shares.

(jj) Thereafter petitioner sold the above described securities on the dates and for the amounts following:

Date	Quantity	Security	Sale price
Dec. 21, 1933	$10,000.00 face amount	City of New York corporate stock issued for water supply purposes (4's of 1959).	$7,837.50
Dec. 20, 1933	125 shares	Southern Pacific Railroad Company	2,381.87
Dec. 26, 1933	320 shares	Hotels Statler Company, Inc.	2,833.60
Dec. 20, 1933	100 shares	Union Pacific Railroad Company	11,191.00

(kk) In her return for the calendar year 1933 petitioner claimed capital losses on the above sales as follows:

City of New York corporate stock issued for water supply purposes (4's of 1959)	$2,106.25
Southern Pacific Railroad Company	12,890.63
Hotels Statler Company, Inc.	13,166.40
Union Pacific Railroad Company	8,309.00

85 (ll) The Commissioner of Internal Revenue, in his final determination, has determined that petitioner's capital losses on the sales of the above securities should be the difference between their fair market values on July 1, 1921, the date on which said securities were transferred of record and delivered by petitioner's father's executors to his testamentary trustees, and the sale prices thereof, and has reduced said losses by the following amounts:

City of New York corporate stock issued for water supply purposes (4's of 1959)	$293.75
Southern Pacific Railroad Company	5,984.37
Hotels Statler Company, Inc.	4,000.00
Union Pacific Railroad Company	7,712.50

VI

(mm) On July 1, 1921, the executors of the estate of petitioner's father transferred of record and delivered to the testamentary trustees for petitioner, pursuant to the provisions of the will above quoted at paragraph III (q), $50,000.00 face amount of the bonds of the City of Philadelphia (4's of 1946), $10,000.00 face amount of the bonds of the City of Auburn, New York (4¾'s of 1933), and $20,000.00 face amount of the bonds of the City of Rochester, New York (4½'s of 1933).

(nn) Upon information and belief, the Commissioner of Internal Revenue has determined the fair market value of said City of Philadelphia bonds on the date of said transfer to be $50,687.50, of said City of Auburn bonds to be $10,227.83, and of said City of Rochester bonds to be $20,082.50.

86 (oo) When petitioner attained the age of 28 years on July 10, 1928, said testamentary trustees distributed the above described bonds to petitioner. On that date said bonds of the City of Philadelphia had a fair market value of $99.81876 per $100.00, or an aggregate fair market value of $49,909.38. On that date said bonds of the City of Auburn had a fair market value of $102.4375 per $100.00, or an aggregate fair market value of $10,243.75, and on said date said bonds of the City of Rochester had a fair market value of $101.85705 per $100.00, or an aggregate fair market value of $20,371.41.

(pp) On or about November 10, 1933, petitioner duly sold said bonds of the City of Philadelphia (4's of 1946) for $42,930.41.

(qq) During said year 1933 all of said bonds of the cities of Auburn and Rochester matured, petitioner receiving on the redemption thereof $10,000.00 for the City of Auburn bonds and $20,000.00 for the City of Rochester bonds.

(rr) In her return for the calendar year 1933, petitioner claimed a capital loss on the sale of said City of Philadelphia bonds (4's of 1946) of $11,259.59, and capital losses on the maturity of the City of Auburn and City of Rochester bonds of $227.83 and $548.00, respectively, said claimed losses being the difference between the claimed fair market values of said securities on the date on which they were distributed to petitioner by the said testamentary trustees and the amounts received therefor by the petitioner on her disposition therof during the calendar year 1933.

(ss) The Commissioner of Internal Revenue, in his final determination, has reduced the capital loss claimed by petitioner on the sale of the City of Philadelphia bonds to
87 $[illegible],757.09, has held that the loss of $227.83 claimed by petitioner on the maturity of the City of Auburn bonds was an ordinary and not a capital loss, and that petitioner's loss on the maturity of the City of Rochester bonds should be reduced to $82.50 and constituted an ordinary loss instead of a capital loss.

VII

(tt) On June 15, 1925, the executors of the estate of petitioner's father transferred of record and delivered to the testamentary trustees for petitioner, pursuant to the provisions of the will above quoted at paragraph III (q), 214 shares of the common capital stock of Niagara, Lockport & Ontario Power Company, which had theretofore cost said executors $4,537.06. Said 214 shares had a fair market value on said June 15, 1925, of $76.00 per share, or an aggregate value of $16,264.00.

(uu) Thereafter and on or about August 1, 1925, said testamentary trustees exchanged said 214 shares of Niagara, Lockport & Ontario Power Company common stock for 267½ shares of the $25.00 par value preferred stock (sometimes referred to as $1.60 preferred stock) and 267½ shares of the common stock of Buffalo, Niagara & Eastern Power Corporation, said exchange being pursuant to a plan of reorganization to which both said Niagara, Lockport & Ontario Power Company and Buffalo, Niagara & Eastern Power Corporation were parties. On the date of said exchange the fair market value of said common stock of Buffalo, Niagara & Eastern Power Corporation was $42.375 per share and of the preferred stock of said corporation was $24.375 per share.

88 (vv) Thereafter and on August 31, 1925, said testamentary trustees purchased for $1,202.50, 32½ additional shares of the common stock of said Buffalo, Niagara & Eastern

Power Corporation, bringing their total holdings of said common stock to 300 shares.

(ww) On the same date said testamentary trustees purchased 32½ shares of the $25.00 par value preferred stock of Buffalo, Niagara & Eastern Power Corporation, paying therefor $780.25.

(xx) Subsequently and on or about January 3, 1926, said testamentary trustees purchased 75 shares of the Class "A" common stock of said Buffalo, Niagara & Eastern Power Corporation, paying therefor $1,500.00.

(yy) Thereafter and on July 10, 1928, the date on which petitioner attained the age of 28 years, said testamentary trustees distributed to her said 300 shares of the $25.00 par value preferred stock of Buffalo, Niagara & Eastern Power Corporation, which, on that date, had a fair market value of $26.25 per share, or an aggregate fair market value of $7,875.00, said 300 shares of the common stock of Buffalo, Niagara & Eastern Power Corporation, which, on that date, had a fair market value of $40.25 per share, or an aggregate fair market value of $12,075.00, and said 75 shares of the Class "A" common stock of Buffalo, Niagara & Eastern Power Corporation, which, on that date had a fair market value of $37.50 per share, or a total fair market value of $2,812.50.

(zz) Thereafter and on or about August 19, 1929, petitioner exchanged said 300 shares of the common stock of Buffalo,
89 Niagara & Eastern Power Corporation for 1,200 shares of the common stock of Niagara Hudson Power Corporation and 300 Class "A" option warrants of said Niagara Hudson Power Corporation, which warrants entitled the holder to purchase at any time on or before October 1, 1944, one share of the corporation's common stock at $35.00 per share for each warrant held.

(aaa) On the same date (August 19, 1929) the petitioner exchanged said 75 shares of the Class "A" common stock of Buffalo, Niagara & Eastern Power Corporation for 300 shares of the common stock of Niagara Hudson Power Corporation and 75 Class "A" option warrants of said Niagara Hudson Power Corporation, which warrants entitled the holder to purchase at any time on or before October 1, 1944, one share of the corporation's common stock at $35.00 per share for each warrant held.

(bbb) On said date (August 19, 1929) common stock of said Niagara Hudson Power Corporation had a fair market value of $26.75 per share, and the Class "A" option warrants had a fair market value on that date of $9.00 each. Said exchange was pursuant to a plan of reorganization to which both said Buffalo,

Niagara & Eastern Power Corporation and said Niagara Hudson Power Corportion were parties.

(ccc) Thereafter and on August 8, 1932, pursuant to corporate action taken by the corporation to reduce its capital stock from 45,000,000 shares of the par value of $10.00 each to 15,000,000 shares of the par value of $15.00 each, petitioner exchanged her 1,500 shares of old common stock of said Niagara Hudson Power Corporation, having a par value of $10.00 each, for 500 new shares of common stock of said corporation, having a par value of $15.00 each, reducing her holdings of such common stock to 500 shares. A corresponding reduction was accomplished in the number of outstanding Class "A" option warrants, by a similar exchange of one for three, petitioner's holdings thereof being reduced to 125 warrants.

90

(ddd) Subsequently and on December 20, 1933, petitioner duly sold said 500 shares of the common stock of Niagara Hudson Power Corporation for $2,506.75, said 125 Class "A" option warrants of said corporation for $40.24, and said 300 shares of the $25.00 par value preferred stock of Buffalo, Niagara & Eastern Power Corporation for $4,800.50.

(eee) In her return for the calendar year 1933 which was filed on or about March 15, 1934, with the Collector of Internal Revenue at Buffalo, New York, petitioner reported capital losses on account of the sale of said 500 shares of Niagara Hudson Power Corporation common stock and said 125 Class "A" option warrants of said corporation of $12,340.51, and on the sale of said 300 shares of $25.00 par value preferred stock of Buffalo, Niagara & Eastern Power Corporation of $3,037.00.

(fff) The Commissioner of Internal Revenue, in his final determination, has reduced the capital loss claimed by petitioner on the sale of said 500 shares of common stock and 125 Class "A" option warrants of Niagara Hudson Power Corporation to $3,035.78, and has disallowed the loss claimed by petitioner on the sale of said 300 shares of $25.00 par value preferred stock of Buffalo, Niagara & Eastern Power Corporation and has determined a capital gain thereon of $2,363.46. In determining the adjusted loss on the Niagara Hudson Power Corporation common stock and the Class "A" option warrants of said corporation, the Commissioner of Internal Revenue has used that part of the cost to the executors of petitioner's father's estate of said 214 shares of Niagara, Lockport & Ontario Power Company common stock which is allocable to the 267½ shares of common stock of Buffalo, Niagara & Eastern Power Corporation received by the testamentary trustees on the exchange of August 1, 1925, plus the said trustees' cost of the

91

32½ additional shares of common stock of Buffalo, Niagara & Eastern Power Corporation purchased by them on August 31, 1925, plus the said trustees' cost of the 75 shares of Class "A" common stock of Buffalo, Niagara & Eastern Power Corporation purchased by them on January 31, 1928, or an aggregate adjusted cost basis of $5,582.77.

(ggg) In determining a gain on the sale of the said preferred stock of Buffalo, Niagara & Eastern Power Corporation, the Commissioner of Internal Revenue has used as the cost basis that part of the said executors' cost of the 214 shares of common stock of Niagara, Lockport & Ontario Power Company which is allocable to the 267½ shares of said preferred stock of Buffalo, Niagara & Eastern Power Corporation received by said testamentary trustees on the exchange of August 1, 1925, plus the cost to said trustees of the 32½ shares of Buffalo, Niagara & Eastern Power Corporation preferred stock purchased by them on August 31, 1925, or an aggregate adjusted cost basis of $2,437.04.

VIII

(hhh) On July 1, 1921, petitioner's father's executors transferred of record and delivered to the testamentary trustees
92 for petitioner, in accordance with the terms of the will above quoted at paragraph III (q), 4,964 shares of the stock of F. W. Woolworth Company, having a par value of $100.00 per share, which, on that date, had a fair market value of $110.00 per share, or an aggregate fair market value of $546,040.00.

(iii) Subsequently and on or about June 30, 1924, said trustees, pursuant to proper corporate action by which the par value of the shares of stock of said F. W. Woolworth Company was reduced from $100.00 each to $25.00 each, exchanged said 4,964 shares of the $100.00 par value F. W. Woolworth Company stock for 19,856 shares of the $25.00 par value F. W. Woolworth Company stock.

(jjj) On or about January 31, 1925, said testamentary trustees purchased for $16,344.00 in cash, 144 additional shares of the stock of said F. W. Woolworth Company, having a par value of $25.00 each, out of which 125 shares were sold on December 31, 1925, at a profit. Out of the lot of 19,856 shares of said stock acquired on the exchange of June 30, 1924, said trustees, on December 31, 1925, sold 125 shares at a profit. On January 31, 1926, said trustees purchased 250 additional shares of said stock for $50,925.00.

(kkk) On February 1, 1927, said F. W. Woolworth Company declared a 50% stock dividend, the said trustees receiving thereon

10,000 shares, bringing their total holdings of said stock to 30,000 shares.

(lll) Upon petitioner's attaining the age of 28 years on July 10, 1928, said trustees duly distributed to her one-half of
93 their holdings of said F. W. Woolworth Company stock, namely, 15,000 shares, of the par value of $25.00 each, which on that date, had a fair market value of $183.125 per share, or a total fair market value of $2,746,875.00.

(mmm) On various dates in 1926 and 1927 petitioner purchased individually 1,000 shares of said F. W. Woolworth Company stock, having a par value of $25.00 each, for $118,691.58.

(nnn) Thereafter and on June 24, 1929, after proper corporate action further reducing the par value of the corporation's shares from $25.00 each to $10.00 each, petitioner exchanged, on the basis of two and one-half for one, the block of 1,000 shares of said F. W. Woolworth Company stock which she had purchased individually and the block of 15,000 shares of said stock which she had acquired from her father's testamentary trustees, receiving in lieu thereof in stock having a par value of $10.00 per share, 2,500 shares and 37,500 shares, respectively.

(ooo) On various dates in December 1933, petitioner duly sold all of said 2,500 shares, which represented her individual purchases of said F. W. Woolworth Company stock for $99,051.03, and from the lot of 37,500 shares of said stock acquired from her father's testamentary trustees she sold 7,500 shares for $292,411.22.

(ppp) In her return for the calendar year 1933 petitioner claimed a capital loss on the sale of said stock of $278,854.33, being the difference between the aggregate of petitioner's cost of the stock which she had purchased individually in 1926 and 1927 and the claimed fair market value of so much of said stock which she had acquired from said
94 testamentary trustees on the date of the distribution thereof to her, and the sale price thereof.

(qqq) The Commissioner of Internal Revenue, in his final determination, has disallowed said capital loss on the sale of said F. W. Woolworth Company stock and has determined a capital gain of $318,128.92, upon the ground that, as a result of the exchange on the basis of two and one-half for one, which occurred on June 24, 1929, the identity of petitioner's shares of stock of F. W. Woolworth Company was lost, that the "first-in—first-out" rule must be applied, and, therefore, that the 10,000 shares sold in December 1933, must be deemed to have been out of the lot of 37,500 shares of said stock which petitioner acquired from said testamentary trustees on July 10, 1928, and that petitioner's cost basis therein is the fair market value of said shares

on the date of the transfer thereof by the executors of petitioner's father's estate to said testamentary trustees.

IX

(rrr) On or about December 29, 1932, petitioner purchased $25,000.00 face amount of the corporate stock of the City of New York (4½'s issued May 1, 1907, interest payable on May 1 and November 1 of each year, maturity on May 1, 1957), paying therefor $23,500.00. On the same date petitioner purchased $25,000.00 face amount of the corporate stock of the City of New York (4½'s issed November 1, 1908, interest payable on May 1 and November 1 of each year, maturity on November 1, 1957), paying therefor $23,500.00. Both lots of bonds were registered securities.

(sss) Thereafter and on or about December 22, 1933, petitioner duly sold said $25,000.00 face amount of said
95 bonds maturing May 1, 1957, for $20,875.00, and said $25,000.00 face amount of said bonds maturing November 1, 1957, for $20,875.00.

(ttt) On December 23, 1933, petitioner purchased $10,000.00 face amount of the corporate stock of the City of New York (4½s issued May 1, 1907, interest payable on May 1 and November 1 of each year, maturity on May 1, 1957), paying therefor $8,512.50. On the same date petitioner purchased $50,000.00 face amount of the corporate stock of the City of New York (4½s issued March 1, 1913, interest payable on March 1 and September 1 of each year, maturity on March 1, 1963), paying therefore $41,875.00. The bonds purchased as stated in this paragraph were coupon bonds.

(uuu) In her income tax return for the calendar year 1933 petitioner claimed $5,250.00 as ordinary losses sustained on the sales mentioned in paragraph IX (sss) hereof.

(vvv) The Commissioner of Internal Revenue, in his final determination, has disallowed all of said loss, upon the ground that petitioner acquired substantially identical securities in the same amount within thirty days before or after said sale.

6. Wherefore, petitioner prays that this Board may hear the proceeding and determine that:

I

Petitioner is entitled to a credit of $381.78 against her 1933 income tax on account of British income taxes withheld at the source by the payor foreign corporation on dividends received by petitioner therefrom.

96

II

The distribution of Great Southern Lumber Company received by petitioner during the calendar year 1933 was a partial liquidating dividend of said Great Southern Lumber Company, properly chargeable to the corporation's capital stock account, and was not a distribution of earnings or profits taxable to petitioner under the provisions of the Revenue Act of 1932.

III

For the purpose of determining gain or loss on petitioner's sale during the calendar year 1933 of certain shares of the common stocks of United States Steel Corporation and American Telephone & Telegraph Company, and of certain bonds of the Federal Land Banks of Louisville and Columbia, petitioner's cost basis is the fair market value of said securities on July 10, 1928, the date on which they were distributed to petitioner by her father's testamentary trustees.

IV

For the purpose of determining gain or loss on petitioner's sale during the calendar year 1933 of certain shares of the capital stock of The Atchison, Topeka & Santa Fe Railway Company, petitioner's cost basis is the fair market value of said securities on July 10, 1928, the date on which they were distributed to petitioner by her father's testamentary trustees.

V

For the purpose of determining gain or loss on petitioner's sale during the calendar year 1933 of certain corporate
97 stock of the City of New York (4s of 1959) and certain shares of the capital stocks of Southern Pacific Railroad Company, Hotels Statler Company, Inc., and Union Pacific Railroad Company, petitioner's cost basis is the fair market value of said securities on July 10, 1928, the date on which they were distributed to petitioner by her father's testamentary trustees.

VI

For the purpose of determining capital gain or loss on petitioner's sale during the calendar year 1933 of the bonds of the City of Philadelphia, Pennsylvania, and ordinary losses on maturity during the calendar year 1933 of the bonds of the Cities

of Auburn and Rochester, New York, petitioner's cost basis is the fair market value of said bonds on July 10, 1928, the date on which they were distributed to petitioner by her father's testamentary trustees.

VII

For the purpose of determining gain or loss on petitioner's sale during the calendar year 1933 of certain shares of the $25.00 par value preferred stock of Buffalo, Niagara & Eastern Power Corporation, and of certain shares of the common stock and warrants of Niagara Hudson Power Corporation, petitioner's cost bases were, respectively, the fair market values as of July 10, 1928, of said $25.00 par value preferred stock of Buffalo, Niagara & Eastern Power Corporation, and the fair market value on that date of the common and Class "A" common stocks of Buffalo, Niagara & Eastern Power Corporation, from which said Niagara Hudson Power Corporation stock and warrants were derived, and which were distributed on said July 10, 1928, to petitioner by her father's testamentary trustees.

98

VIII

Petitioner sustained a capital loss of $278,854.33 on the sale during the calendar year 1933 of 10,000 shares of the capital stock of F. W. Woolworth Company, upon the ground:

i. That for the purpose of applying the "first-in—first-out" rule, the dates of acquisitions should be, in the case of the stock purchased by petitioner, the date of such purchase, and in the case of stock acquired by the petitioner from her father's testamentary trustees, the date of distribution to her by said trustees, and, therefore, that petitioner's purchases of said stock prior to July 10, 1928, must be exhausted first; and

ii. That on so much of said stock as was acquired by petitioner from her father's testamentary trustees, petitioner's cost basis is the fair market value thereof on July 10, 1928, the date on which said securities were distributed to her by said trustees.

IX

Petitioner sustained an ordinary loss of $4,200.00 on $40,000.00 face amount (out of a total of $50,000 face amount) of New York City corporate stock (4½'s of 1957) sold by petitioner during the calendar year 1933; that not in excess of $10,000.00

face amount of substantially identical securities was purchased within thirty days before or after the date of said sale.

(S) RALPH M. ANDREWS,
Counsel for Petitioner,
Office and Post-office Address,
239 Main Street, Buffalo, New York.

99 [*Duly sworn to by Marjorie K. Campbell; jurat omitted in printing.*]

100 Before United States Board of Tax Appeals

Docket No. 84639

[Same title]

Answer to amended petition

The Commissioner of Internal Revenue by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the amended petition filed in the above-entitled appeal, admits, denies and avers as follows:

1. Admits the allegations contained in paragraph 1 of the amended petition.

2. Admits the allegations contained in paragraph 2 of the amended petition.

3. Admits that the tax in controversy is income tax for the calendar year 1933. Denies that the amount in controversy is as alleged in paragraph 3 of the amended petition.

4 I. Admits that the Commissioner disallowed an amount of $381.78 claimed as a credit on petitioner's income tax return. Denies that the Commissioner thereby erred, and denies all other allegations, if any, contained in subparagraph I of paragraph 4 of the amended petition.

II. Admits that the Commissioner determined that a dividend of $672.00 received by petitioner from the Great Southern Lumber Company is taxable to the petitioner to the extent of 83.6544% thereof. Denies that the Commissioner thereby erred.

101 III. Admits that the Commissioner determined that petitioner's basis for the purpose of determining gain or loss on the sale during the calendar year 1933 of certain shares of the common stock of United States Steel Corporation and American Telephone & Telegraph Company, and of certain bonds of the Federal Land Banks of Louisville, Kentucky, and Columbus, Ohio, which had theretofore been acquired by the trustees for petitioner's benefit was the cost thereof to the trustees. Denies

that the Commissioner thereby erred, and denies all other allegations contained in subparagraph III of paragraph 4 of the amended petition.

IV, V, VI, & VII. Denies all the allegations contained in subparagraphs IV, V, VI, and VII of paragraph 4 of the amended petition.

VIII. Admits that the Commissioner determined that on petitioner's sale during the calendar year 1933 of 10,000 shares of the capital stock of F. W. Woolworth Company, petitioner realized a capital gain of $318,128.92 instead of sustaining a capital loss of $278,854.33. Admits that in determining said capital gain the Commissioner applied the "first in, first out" rule. Denies that the Commissioner thereby erred, and denies all other allegations contained in subparagraph VIII of paragraph 4 of the amended petition.

IX. Admits that the Commissioner disallowed $5,250.00 claimed by petitioner on her return as an ordinary loss sustained on the sale during the calendar year 1933 of $50,000.00 face amount of New York City bonds (4½'s of 1957) upon the ground that petitioner acquired substantially identical securities within thirty days before or after said sale. Denies that
102 the Commissioner thereby erred, and denies all other allegations, if any, contained in subparagraph IX of paragraph 4 of the amended petition.

X. In the event it be determined that the Commissioner overstated petitioner's net income for 1933, respondent avers that petitioner's deduction for contributions should be reduced to an amount not exceeding 15% of the net income as redetermined.

5. I (a). Admits all the allegations contained in subparagraph I (a) of paragraph 5 of the amended petition.

I (b). Admits that on various dates during the year 1933 there became payable to the petitioner dividends in respect of her shares of stock of F. W. Woolworth & Co., Ltd. Denies that said dividends amounted in the aggregate to $1,527.12.

I (c). Denies all the allegations contained in subparagraph I (c) of paragraph 5 of the amended petition.

I (d). Admits that in her income tax return for the calendar year 1933 filed with the Collector of Internal Revenue at Buffalo, New York, on or about March 15, 1934, petitioner included in gross income $1,527.12 as dividends received on the stock owned by her in F. W. Woolworth & Co., Ltd., and claimed a credit of $381.78 under item 38 of said return as tax withheld by the British government on said dividends. Denies all other allegations, if any, contained in subparagraph I (d) of paragraph 5 of the amended petition.

I (e). Admits that the Commissioner did not allow any part of the $381.78 as a credit. Denies all other allegations contained in subparagraph I (e) of paragraph 5 of the amended pe-
103 tition and avers that the Commissioner included only $1,145.34 in petitioner's gross income as dividends received from F. W. Woolworth & Co. Ltd.

II (f). Admits that on July 1, 1933, and for some time prior thereto, petitioner was the owner of 224 shares of the capital stock of Great Southern Lumber Company. Denies all other allegations contained in subparagraph II (f) of paragraph 5 of the amended petition.

II (g). Admits that in the year 1933, and for many years prior thereto, Great Southern Lumber Company was the owner of a large quantity of long leaf yellow pine timber situated in the northern part of the state of Louisiana, and owned and operated a sawmill in the city of Bogalusa, Louisiana. Denies all other allegations contained in subparagraph II (g) of paragraph 5 of the amended petition.

II (h), (i), (j), & (k). Denies all the allegations contained in subparagraphs II (h), (i), (j), and (k) of paragraph 5 of the amended petition.

II (l). Admits that on or about July 1, 1933, Great Southern Lumber Company paid in cash to the stockholders of record the sum of $3.00 per share. Denies all other allegations contained in subparagraph II (l) of paragraph 5 of the amended petition.

II (m) Admits that on July 1, 1933, the Great Southern Lumber Company paid $672.00 to the petitioner. Denies all other allegations contained in subparagraph II (m) of paragraph II (n) of paragraph 5 of the amended petition.

II (n). Denies all the allegations contained in subparagraph 5 of the amended petition.

104 II (o). Admits that the petitioner did not include any part of the amount so received in her taxable net income for the year 1933. Denies all other allegations contained in subparagraph II (o) of paragraph 5 of the amended petition.

II (p). Admits that the Commissioner included in petitioner's taxable net income for 1933 $562.16 of the total distribution of $672.00 from the Great Southern Lumber Company upon the ground that 83.6544% of the total was taxable to the petitioner. Denies all other allegations contained in subparagraph II (p) of paragraph 5 of the amended petition.

III (q). Admits that petitioner's father, Seymour H. Knox, died on May 16, 1915, leaving a last will and testament, by which a portion of the estate was devised and bequeathed in trust for

the benefit of the petitioner. Denies all other allegations contained in subparagraph III (q) of paragraph 5 of the amended petition.

III (r). Admits that the trustees of the aforesaid trust purchased the securities on or about the dates and for the amounts set out in subparagraph III (r) of paragraph 5 of the amended petition. Denies all other allegations contained in paragraph 5 III (r) of the amended petition.

III (s). Admits that on or about June 1, 1928, the trustees of the aforesaid trust received, with respect to said 175 shares of stock of American Telephone & Telegraph Company, one warrant for each share held. Admits that said warrants entitled the holder thereof to acquire one new share of the stock of American Telephone & Telegraph Company for $100.00 per share for each six warrants held.

III (t). Admits that on or about June 1, 1927, the trustees of the aforesaid trust received a 40% stock dividend with
105 respect to said 600 shares of common stock of United States Steel Corporation. Denies all other allegations contained in subparagraph III (t) of paragraph 5 of the amended petition.

III (u). Admits that on or about July 10, 1928, the aforementioned securities were transferred from the trustees to the petitioner. Denies all other allegations contained in subparagraph III (u) of paragraph 5 of the amended petition.

III (v). Admits that on or about July 25, 1928, petitioner obtained 29 additional shares of the capital stock of American Telephone & Telegraph Company at an expenditure of $2,998.60 through the exercise of the aforementioned rights. Denies all other allegations contained in subparagraph III (v) of paragraph 5 of the amended petition.

III (w). Admits that the petitioner sold the securities listed in subparagraph III (w) of paragraph 5 of the amended petition on the dates and for the amounts therein stated. Denies all other allegations contained in subparagraph III (w) of paragraph 5 of the amended petition.

III (x). Admits that in her income tax return for the calendar year 1933 petitioner reported that she sustained capital losses on the sales of the aforesaid securities in the amounts set out below:

Security	Amount reported as capital loss
840 shares common stock United States Steel Corporation	$80,283.45
204 shares American Telephone & Telegraph Company	13,640.95
106 $25,000.00 face amount Federal Land Bank (Louisville) bonds	4,437.50
$8,000.00 face amount Federal Land Bank (Columbia) bonds	1,390.00

Denies all other allegations contained in subparagraph III (x) of paragraph 5 of the amended petition.

III (y). Admits that the Commissioner held that petitioner's basis for each of the aforesaid securities was less than that claimed by the petitioner, and as a result determined that the capital loss sustained on the sale of the United States Steel Corporation stock was $36,892.50 less than the amount claimed by the petitioner; that the capital loss sustained on the sale of the American Telephone & Telegraph Company stock was $9,293.60 less than the amount claimed by the petitioner, that the capital loss sustained on the sale of the Federal Land Bank bonds (Louisville) was $605.63 less than the amount claimed by the petitioner; and that the capital loss sustained on the sale of the Federal Land Bank bonds (Columbia) was $204.00 less than the amount claimed by the petitioner. Admits that the Commissioner held that the basis to petitioner for each of the aforesaid securities was the cost thereof to the aforementioned trustees. Denies all other allegations contained in subparagraph III (y) of paragraph 5 of the amended petition.

IV (z). Admits all the allegations contained in subparagraph IV (z) of paragraph 5 of the amended petition.

IV (aa). Admits that on July 1, 1921 the executors transferred of record and delivered to the trustees for petitioner 100 of
107 said shares of stock of The Atchison, Topeka & Santa Fe Railway Company. Admits that on July 1, 1921, the fair market value of said 100 shares of said stock was $8,050.00. Denies all other allegations contained in subparagraph IV (aa) of paragraph 5 of the amended petition.

V (bb). Admits that on April 30, 1928, said trustees purchased four additional shares of said stock for $400.00. Denies all other allegations contained in subparagraph IV (bb) of paragraph 5 of the amended petition.

IV (cc). Admits that upon petitioner's attaining the age of 28 years on July 10, 1928, the trustees transferred said 104 shares of stock of The Atchison, Topeka & Santa Fe Railway Company to petitioner. Denies all other allegations contained in subparagraph IV (cc) of paragraph 5 of the amended petition.

IV (dd). Admits that on December 20, 1933, petitioner sold 104 shares of The Atchison, Topeka & Santa Fe Railway Company stock for $5,509.94.

IV (ee). Admits that on her income tax return for the calendar year 1933 petitioner claimed $14,237.06 as a capital loss sustained on the sale of 104 shares of stock of The Atchison, Topeka & Santa Fe Railway Company. Denies all other allegations contained in subparagraph IV (ee) of paragraph 5 of the amended petition.

IV (ff). Admits that the Commissioner determined that petitioner sustained a capital loss of only $2,940.06 on the sale of said stock, the same being the difference of the fair market value of the 100 shares on July 1, 1921, plus the cost to the
108 trustees of the four shares later acquired by them, and the sale price of $5,509.94. Denies all other allegations contained in subparagraph IV (ff) of paragraph 5 of the amended petition.

V (gg). Admits that on or about July 1, 1921, petitioner's father's executors transferred of record and delivered to the trustees for petitioner the securities listed in subparagraph V (gg) of paragraph 5 of the amended petition. Admits that on July 1, 1921, the values of the shares of common stock of Southern Pacific Company, Hotels Statler Company, Inc., and Union Pacific Railroad Company were as set out in said subparagraph V (gg) of paragraph 5 of the amended petition. Admits that the value of the $10,000.00 face amount of New York corporate stock 4's of May 1, 1959, did not exceed $9,650.00 and avers that the value of said City of New York corporate stock was $79.50. Denies all other allegations contained in subparagraph V (gg) of paragraph 5 of the amended petition.

V (hh). Admits that upon petitioner's attaining the age of 28 years on July 10, 1928, the securities listed in subparagraph V (hh) of paragraph 5 of the amended petition were transferred from the trustees to the petitioner. Denies all other allegations contained in subparagraph V (hh). of paragraph 5 of the amended petition.

V (ii). Admits that on or about December 28, 1929, petitioner received on the stock of Hotels Statler Company, Inc., a 100% stock dividend of 160 shares. Denies all other allegations contained in subparagraph V (ii) of paragraph 5 of the amended petition.

109 V (jj). Admits that petitioner sold securities in the amounts, on the dates, and for the sales prices listed in subparagraph V (jj) of paragraph 5 of the amended petition.

V (kk). Admits that in her income tax return for the calendar year 1933 petitioner claimed capital losses on the above-mentioned sales in the amounts listed in subparagraph V (kk) of paragraph 5 of the amended petition. Denies all other allegations contained in subparagraph V (kk) of paragraph 5 of the amended petition.

V (ll). Admits that the Commissioner held that petitioner's capital losses on the sales of the above-mentioned securities are the differences between the value set out in subparagraph V (gg) of paragraph 5 of the amended petition and the sales prices

set out in subparagraph V (jj) of paragraph 5 of the amended petition, and as a result determined that the capital loss sustained on the sale of the City of New York corporate stock (4's of 1959) was $293.75 less than the amount claimed by petitioner; that the capital loss sustained on the sale of the Southern Pacific Railroad Company stock was $5,984.37 less than the amount claimed by petitioner; that the capital loss sustained on the sale of the Hotels Statler Company, Inc. stock was $4,000.00 less than the amount claimed by the petitioner; and that the capital loss sustained on the sale of the Union Pacific Railway Company stock was $7,712.50 less than the amount claimed by the petitioner. Avers that in determining the capital loss sustained on the sale of the $10,000.00 face amount of City of New York corporate stock, the Commissioner erred in favor of the petitioner by using as the fair market value on July 1, 1921, of said corporate stock the sum of $9,650.00 rather than the sum of $7,950.00, the capital loss determined by the Commissioner being thereby overstated by the sum of $1,700.00. Denies all other allegations contained in subparagraph V (ll) of paragraph 5 of the amended petition.

VI (mm). Admits that on July 1, 1921, petitioner's father's executors transferred of record and delivered to the trustees for petitioner $50,000.00 face amount of the bonds of the City of Philadelphia (4's of 1946), $10,000.00 face amount of the bonds of the City of Auburn, New York (4¾'s of 1933) and $20,000.00 face amount of the bonds of the City of Rochester, New York (4½'s of 1933). Denies all other allegations contained in subparagraph VI (mm) of paragraph 5 of the amended petition.

VI (nn). Admits that the Commissioner determined that on the date of said transfer the fair market value of the City of Philadelphia bonds was $50,687.50, the fair market value of the City of Auburn bonds was $10,227.83, and the fair market value of the City of Rochester bonds was $20,082.50.

VI (oo). Admits that on July 10, 1928, the aforesaid bonds were transferred from the trustees to the petitioner. Denies all other allegations contained in subparagraph VI (oo) of paragraph 5 of the amended petition.

VI (pp) & (qq). Admits all the allegations contained in subparagraphs VI (pp) and (qq) of paragraph 5 of the amended petition.

VI (rr). Admits that in her income tax return for the calendar year 1933 petitioner claimed $11,259.59 as a capital loss sustained on the sale of said City of Philadelphia bonds, and claimed $227.83 and $548.00 as capital losses sustained on the redemption of the City of Auburn and City of Rochester

bonds, respectively. Denies all other allegations contained
111 in subparagraph VI (rr) of paragraph 5 of the amended petition.

VII (ss). Admits that the Commissioner determined that a capital loss of only $7,757.09 was sustained on the sale of the City of Philadelphia bonds; determined that the loss of $227.83 on the redemption of the City of Auburn bonds was an ordinary and not a capital loss; and determined that the loss sustained on the redemption of the City of Rochester bonds was only $82.50 and was an ordinary loss instead of a capital loss. Denies all other allegations contained in subparagraph VI (ss) of paragraph 5 of the amended petition.

VII (tt). Admits that on June 15, 1925, the executors of the estate of petitioner's father transferred of record and delivered to the trustees for petitioner 214 shares of the common stock of Niagara, Lockport & Ontario Power Company which had theretofore cost the said executors $4,527.06. Admits that said 214 shares had a fair market value on June 15, 1925, of $76.00 per share or an aggregate value of $16,264.00. Denies all other allegations contained in subparagraph VII (tt) of paragraph 5 of the amended petition.

VII (uu). Admits all the allegations contained in subparagraph VI (uu) of paragraph 5 of the amended petition.

VII (vv). Admits that on August 31, 1925, the trustees purchased for $1,202.50, 32½ additional shares of the common stock of Buffalo, Niagara & Eastern Power Corporation.

VII (ww) & (xx). Admits all the allegations contained in subparagraphs VII (ww) and (xx) of paragraph 5 of the amended petition.

112 VII (yy). Admits that upon petitioner's attaining the age of 28 years on July 10, 1928, the trustees transferred the 300 shares of preferred stock, 300 shares of common stock, and 75 shares of Class "A" common stock of Buffalo, Niagara & Eastern Power Corporation to petitioner. Denies all other allegations contained in subparagraph VII (yy) of paragraph 5 of the amended petition.

VII (zz). Admits that in 1929 petitioner exchanged said 300 shares of common stock of Buffalo, Niagara & Eastern Power Corporation for 1,200 shares of the common capital stock of Niagara Hudson Power Corporation and 300 Niagara Hudson Power Corporation option warrants. Denies all other allegations contained in subparagraph VII (zz) of paragraph 5 of the amended petition.

VII (aaa). Admits that in 1929 petitioner exchanged the 75 shares of Class "A" common stock of Buffalo, Niagara & Eastern Power Corporation for 300 shares of the common capital stock

of Niagara Hudson Power Corporation and 75 Class "A" option warrants of said Niagara Hudson Power Corporation. Denies all other allegations contained in subparagraph VII (aaa) of paragraph 5 of the amended petition.

VII (bbb). Admits the allegations contained in subparagraph VII (bbb) of paragraph 5 of the amended petition.

VII (ccc). Admits all the allegations contained in subparagraph VII (ccc) of paragraph 5 of the amended petition.

VII (ddd). Admits that on December 20, 1933, petitioner sold said 500 shares of the common stock of Niagara Hudson Power Corporation for $2,506.75 and said 125 Class "A" option
113 warrants of said corporation for $40.24, and said 300 shares of preferred stock of Buffalo, Niagara & Eastern Power Corporation for $4,800.50.

VII (eee). Admits that in her income tax return for the calendar year 1933, which was filed on or about March 15, 1934, with the Collector of Internal Revenue at Buffalo, New York, petitioner claimed $12,340.51 as capital losses sustained on the sale of the 500 shares of common stock and 125 Class "A" option warrants of Niagara Hudson Power Corporation. Admits that in said income tax return petitioner claimed $3,037.00 as a capital loss sustained on the sale of the 300 shares of preferred stock of Buffalo, Niagara & Eastern Power Corporation. Denies all other allegations contained in subparagraph VII (eee) of paragraph 5 of the amended petition.

VII (fff). Admits that the Commissioner determined that the capital loss sustained by petitioner on the sale of the 500 shares of common stock and 125 Class "A" option warrants of Niagara Hudson Power Corporation was only $3,035.78. Admits that the Commissioner determined that petitioner realized a capital gain of $2,363.46 on the sale of the 300 shares of preferred stock of Buffalo, Niagara & Eastern Power Corporation. Admits that the basis determined by the Commissioner for the 500 shares of common stock and 125 Class "A" option warrants of Niagara Hudson Power Corporation was $5,582.77. Denies all other allegations contained in subparagraph VII (fff) of paragraph 5 of the amended petition.

VII (ggg). Admits that the basis for the 300 shares of preferred stock of Buffalo, Niagara & Eastern Power Corporation determined by the Commissioner was $2,437.04
114 Denies all other allegations contained in subparagraph VII (ggg) of paragraph 5 of the amended petition.

VIII (hhh). Admits that on July 1, 1921, petitioner's father's executors transferred of record and delivered to the trustees for petitioner 4,964 shares of the stock of the F. W. Woolworth Company having a par value of $100.00 per share which on that

date had a fair market value of $110.00 per share. Denies all other allegations contained in subpargraph VII (hhh) of paragraph 5 of the amended petition.

VIII (iii). Admits all the allegations contained in subparagraph VIII (iii) of paragraph 5 of the amended petition.

other allegations contained in subparagraph VII (hhh) of para-

VIII (jjj). Denies all the allegations contained in subparagraph VIII (jjj) of paragraph 5 of the amended petition.

VIII (lll). Admits that upon petitioner's attaining the age of 28 years on July 10, 1928, 15,000 shares of F. W. Woolworth Company stock were transferred from the trustees to petitioner. Denies all other allegations contained in subparagraph VIII (lll) of paragraph 5 of the amended petition.

VIII (mmm). Admits that on various dates petitioner acquired 1,000 shares of F. W. Woolworth Company stock, having a par value of $25.00 each. Admits that petitioner expended in connection with the acquisition of this stock the sum of $118,691.58.

115 VIII (nnn). Admits that on or about June 24, 1929, after proper corporate action further reducing the par value of the corporation's shares from $25.00 each to $10.00 each, petitioner's holdings of 16,000 shares of $25.00 par value common stock of F. W. Woolworth Company were converted into 40,000 shares of $10.00 par value stock of said company. Denies all other allegations contained in subparagraph VIII (nnn) of paragraph 5 of the amended petition.

VIII (ooo). Admits that on various dates in December 1933 petitioner sold 10,000 shares of F. W. Woolworth Company stock for an aggregate amount of $391,462.25. Denies all other allegations contained in subparagraph VIII (ooo) of paragraph 5 of the amended petition.

VIII (ppp). Admits that in her income tax return for the calendar year 1933 petitioner claimed $278,854.33 as a capital loss sustained on the sale of said stock. Denies all other allegations contained in subparagraph VIII (ppp) of paragraph 5 of the amended petition.

VIII (qqq). Admits that the Commissioner disallowed said item and determined that petitioner realized a capital gain of $318,128.92 upon the sale of said 10,000 shares of stock of F. W. Woolworth Company. Admits that the Commissioner held that the identity of petitioner's shares of stock of F. W. Woolworth Company was lost; that the "first in, first out" rule must be applied; that the 10,000 shares sold in December 1933 must be deemed to have been out of the lot of 37,500 shares of stock transferred on July 10, 1928, from the trustees to the petitioner; and that petitioner's basis for the shares sold is the fair

116 market value on July 1, 1921, of 666⅔ shares of F. W. Woolworth Company stock. Denies all other allegations contained in subparagraph VIII (qqq) of paragraph 5 of the amended petition.

IX (rrr). Admits that prior to December 1933 petitioner purchased $50,000.00 face amount of the corporate stock of the City of New York (4½'s of 1957). Admits that said bonds (corporate stock) were registered securities. Denies all other allegations contained in subparagraph IX (rrr) of paragraph 5 of the amended petition.

IX (sss). Admits that in December 1933 petitioner sold all of said bonds. Denies all other allegations contained in subparagraph IX (sss) of paragraph 5 of the amended petition.

IX (ttt). Admits that on or about the same date petitioner purchased corporate stock of the City of New York (4½'s of 1957). Denies all other allegations contained in subparagraph IX (ttt) of paragraph 5 of the amended petition.

IX (uuu). Admits that in her income tax return for the calendar year 1933 petitioner claimed $5,250.00 as an ordinary loss sustained on the sale of said corporate stock of the City of New York (4½'s due 1957).

IX (vvv). Admits that the Commissioner disallowed all of said deduction upon the ground that petitioner acquired substantially identical securities within thirty days before or after said sale. Denies all other allegations contained in subparagraph IX (vvv) of paragraph 5 of the amended petition.

117 (www). Respondent avers that in determining the deficiency for 1933 the Commissioner allowed petitioner a deduction for contributions in the amount of $3,321.00.

Denies generally and specifically each and every allegation contained in the taxpayer's amended petition not hereinbefore admitted, qualified, or denied.

6. In further defense of the Commissioner's determination, and in support of an alternative claim to an increased deficiency for the year 1933, respondent relies upon the following additional facts:

(a) With respect to the securities sold by petitioner in the year 1933, which were owned by petitioner's father on the date of his death or derived from securities owned by petitioner's father on the date of his death, such securities were acquired by petitioner by transfer in trust before January 1, 1921; and the bases to petitioner of the securities so acquired were the fair market values thereof on May 16, 1915, as provided in Sec. 113 (a) (4) of the Revenue Act of 1932.

(b) On information and belief, the fair market values of said securities owned by petitioner's father on the date of his death

were less than the amounts used as bases by the Commissioner in making his determination, and were less than the respective bases claimed by the petitioner in this proceeding.

(c) With respect to securities sold by petitioner in 1933, which were purchased by the executors or which were derived from securities purchased by the executors, such securities were acquired by petitioner by purchase, and the bases to
118 petitioner of the securities so acquired were the respective costs thereof, viz, the amounts paid by the executors.

(d) On information and belief, the respective costs of such securities were less than the bases used by the Commissioner in his determination, and were less than the bases claimed by the petitioner in this proceeding.

Wherefore, it is prayed that the Board redetermine the correct amount of the deficiency involved in this proceeding to be equal to the amount determined by the Commissioner, viz, $86,937.47 plus any and all additional amounts which may result from the correction of any error made by the Commissioner. The Commissioner hereby makes claim for the increased deficiency resulting from such redetermination.

(Signed) J. P. WENCHEL,
Y.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
W. HERDMAN SCHWATKA,
EDWARD L. UPDIKE,
Special Attorneys,
Bureau of Internal Revenue.

119 Before United States Board of Tax Appeals

Docket No. 84639

[Same title.]

Amended reply

Filed at Hearing Dec. 14, 1938

The petitioner, by her attorney, Ralph M. Andrews, in reply to respondent's amended answer herein, admits and denies the affirmative allegations thereof as follows:

4 X. Admits that the deduction allowable to petitioner on account of contributions during the calendar year 1933 should be computed in accordance with the provisions of paragraph 23 (n) of the Revenue Act of 1932. Denies each and every other alle-

gation contained in paragraph "4 X" of respondent's amended answer.

5 I (e). Admits that the Commissioner of Internal Revenue has included an amount of $1,145.34 in petitioner's gross income for the calendar year 1933 as dividends received from F. W. Woolworth & Co., Ltd.

5 V (gg). Denies that the $10,000.00 face amount of corporate stock of the City of New York issued for water supply purposes, 4's of 1959, referred to in paragraph 5 V (gg) of respondent's amended answer, had a fair market value of $7,900.00 on July 1, 1921, and alleges that said stock had a fair market value on said date of not less than $8,025.00.

120 5 V (ll). Denies that the $10,000.00 face amount of corporate stock of the City of New York issued for water supply purposes, 4's of 1959, referred to in paragraph "5 V (ll)" of the respondent's amended answer had a fair market value of July 1, 1921, of only $7,900.00 and alleges that said corporate stock had a value of not less than $8,025.00 on said date. Denies all other allegations contained in said paragraph.

6 (a). Denies all of the allegations contained in paragraph "6 (a)" of respondent's amended answer.

6 (b). Denies that the fair market values of all the securities owned by petitioner's father on the date of his death were less than the amounts used as bases by the Commissioner in making his determination and less than the respective bases claimed by the petitioner in this proceeding.

6 (c). Denies all of the allegations contained in paragraph "6 (c)" of respondent's amended answer.

6 (d). Denies all of the allegations contained in paragraph "6 (d)" of respondent's amended answer.

Denies generally and specifically each and every allegation contained in respondent's amended answer not hereinbefore admitted, qualified or denied.

Wherefore, petitioner prays that the Board may hear this proceeding and determine that the respondent erred in the respects stated in paragraph "4" of the amended petition, that the claims for an additional deficiency made in respondent's amended
121 answer are without merit and should be denied and that petitioner is entitled to the relief prayed for in paragraph "6" of the amended petition.

(S) RALPH M. ANDREWS,
Counsel for Petitioner,
Office and Post Office Address, 1330 Marine Trust Bldg., 239 Main Street, Buffalo, New York.

(LLs.)

122 Before United States Board of Tax Appeals

Docket No. 84639

[Same title.]

Stipulation of facts

Filed at Hearing Dec. 14, 1938

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the following facts shall be taken as true for the purpose of this proceeding and in the determination of the above appeal, provided, however, that this stipulation shall be without prejudice to the right of either party hereto to introduce other and further evidence at the hearing hereof not inconsistent with the facts herein stipulated to be true.

1. Marjorie K. Campbell, the petitioner herein, is and at all material times was a resident of the Village of East Aurora, County of Erie, and State of New York.

I

2. With respect to the allegation of error contained in paragraph 4–I of the petition herein and denied in paragraph 4–I of respondent's answer, it is now stipulated by the parties hereto, in view of the decision of the United States Supreme Court in Mary Duke Biddle v. Commissioner of Internal Revenue, 302 U. S. 573, that the respondent has correctly disallowed a
123 credit of $381.78 claimed by petitioner in her return on account of certain British taxes in the same amount paid by F. W. Woolworth & Co., Ltd., in respect of dividends received by petitioner on her shares in said company. It is further stipulated that the Commissioner has correctly reduced petitioner's gross income by $381.78, the amount of said tax.

II

3. With respect to the error alleged in paragraph 4–II of the petition herein and denied in paragraph 4–II of respondent's answer, it is now stipulated and agreed by the parties hereto, and without prejudice to either of them, that of the total dividends amounting to $672.00 received by petitioner during the calendar year 1933, from Great Southern Lumber Company, 83.6544% or $562.16 is taxable to petitioner as determined by the respondent in his deficiency notice (page 2 of Exhibit "A" of the petition in this proceeding).

III

4. Petitioner was born on July 10, 1900, as Marjorie Knox. On June 7, 1927, she was married to J. Hazard Campbell.

5. Petitioner's father, Seymour H. Knox, died on May 16, 1915, leaving a last will and testament, a true and correct copy of which is annexed hereto, designated Exhibit "A" and hereby made a part hereof. Said will was probated on June 3, 1915, in the office of the Surrogate of Erie County, New York. On June 3, 1915, letters testamentary of the last will and testament of Seymour H. Knox, deceased, were duly granted to Grace M. Knox, Henry D. Knox, and Walter P. Cooke. Seymour H. Knox, petitioner's brother, attained the age of twenty-one years
124 on September 1, 1919. On May 24, 1921, said Seymour H. Knox took and filed with the Surrogate of Erie County the oath of office as executor and on December 21, 1922, nunc pro tunc as of May 24, 1921, supplemental letters testamentary of said last will and testament were duly granted to him "jointly with said executors Grace M. Knox, Henry D. Knox, and Walter P. Cooke." Said executors are hereinafter referred to as "the executors."

6. On May 24, 1921, Henry D. Knox, Walter P. Cooke, and Seymour H. Knox (hereinafter referred to as "the trustees") took and filed with the Surrogate of Erie County, New York, their oaths of office as trustees of the trust under "Article Twenty-first (D)" of the will (Exhibit "A"). On July 1, 1921, the trustees opened their records and books of account and rented a safe deposit vault in the following name: "Walter P. Cooke, Henry D. Knox, Seymour H. Knox, Trustees for Marjorie Knox."

7. Thereafter the trustess of said trust purchased the following securities on the dates, in the amounts and for the purchase prices set out below:

Date	Quantity	Security	Purchase Price
Dec. 16, 1925	300 shares common stock	U. S. Steel Corporation	$40,275.00
Dec. 19, 1925	300 shares common stock	U. S. Steel Corporation	40,012.50
Dec. 19, 1925	150 shares common stock	American Telephone & Telegraph Company.	21,343.75
125 May 3, 1923	$25,000.00 face amount 4½% bonds due 1953.	Federal Land Bank (Louisville)	25,125.00
May 27, 1925	$8,000.00 face amount 4½% bonds due 1955.	Federal Land Bank (Columbia)	8,220.00

8. On or about June 8, 1926, the trustees received in respect of said 150 shares of common stock of the American Telephone & Telegraph Company a warrant entitling them to obtain one

new share of the common stock of said company at $102.75 per share for each six shares held. At the time such rights were issued, the respective values of stock and rights were as follows:

The stock per share	$143.50
Each right (six rights being necessary to acquire one new share)	6.3125

On July 30, 1926, the trustees exercised said rights and obtained twenty-five additional shares, paying in connection therewith $2,568.75 in cash.

9. On or about June 1, 1927, the trustees received a 40% stock dividend consisting of 240 shares of the common stock of the U. S. Steel Corporation on the 600 shares of common stock of said corporation which had been purchased by the trustees as stated in paragraph 7 hereof.

10. On or about June 1, 1928, the trustees received on the 175 shares of common stock of American Telephone & Telegraph Company referred to in paragraphs 7 and 8 hereof warrants entitling the holder thereof to obtain one new
126 share of the common stock of the American Telephone & Telegraph Company at $103.40 per share for each six shares held. At the time said warrants or rights were issued the respective values of stock and rights were as follows:

The stock per share	$189.875
Each right (six rights being necessary to obtain one share)	14.3125

On or about June 22, 1928, the trustees sold one of said rights, receiving therefor $12.00, the full amount of which they reported in their income tax return for the calendar year 1928, and paid a tax thereon.

11. Petitioner attained the age of 28 years on July 10, 1928. Thereupon and on that date the trustees in accordance with the will (Exhibit "A") of petitioner's father transferred of record and delivered to the petitioner certain securities and property including the securities mentioned in paragraphs 7 to 10, inclusive, hereof, which on that date had the fair market values set out below:

Quantity	Security	Unit value	Total value
840 shares common stock	U. S. Steel Corporation	$139.50	$117,180.00
175 shares common stock	American Telephone & Telegraph Company.	176.5625	30,898.44
174 rights	American Telephone & Telegraph Company.	12.125	2,109.75
$25,000.00 face amount 4½% bonds due 1953.	Federal Land Bank (Louisville)	100.125	25,031.25
$8,000.00 face amount 4½% bonds due 1955.	Federal Land Bank (Columbia)	100.375	8,030.00

127 12. On July 25, 1928, petitioner obtained 29 additional shares of the capital stock of American Telephone & Telegraph Company at an expenditure of $2,998.60 through the exercise of the aforementioned warrants or rights.

13. During the calendar year 1933 the petitioner sold the following securities heretofore mentioned in paragraphs 7 to 12 hereof, on the dates and for the amounts set out below:

Date	Quantity	Security	Sales price
Dec. 1, 1933	840 shares common stock	U. S. Steel Corporation	$36,854.66
Dec. 20, 1933	204 shares common stock	American Telephone & Telegraph Company.	22,465.15
Dec. 21, 1933	$25,000.00 face amount 4½% bonds due 1953.	Federal Land Bank (Louisville)	20,593.75
Dec. 27, 1933	$8,000.00 face amount 4½% bonds due 1955.	Federal Land Bank (Columbia)	6,680.00

14. On her income tax return for the calendar year 1933 petitioner claimed as the bases for these securities and as capital losses the amounts set out below:

128

Quantity	Security	Amount claimed as basis	Amount claimed as capital loss
840 shares common stock	U. S. Steel Corporation	$117,180.00	$80,283.34
204 shares common stock	American Telephone & Telegraph Company.	36,204.70	13,739.55
$25,000.00 face amount 4½% bonds due 1953.	Federal Land Bank (Louisville)	25,031.25	4,437.50
$8,000.00 face amount 4½% bonds due 1955.	Federal Land Bank (Columbia)	8,020.00	1,390.00

15. The amounts claimed as the bases of these securities in petitioner's return are the amounts which petitioner claimed as the fair market values of the securities on the date she attained her twenty-eighth birthday plus, in the case of the stock of the American Telephone & Telegraph Company, the amount of $2,998.60, expended on July 25, 1928 in obtaining the 29 shares of the stock of that company.

16. The Commissioner in the notice of deficiency determined that the petitioner sustained capital losses on the sales of these securities in the following amounts:

129

Quantity	Security	Amount used by Commissioner as basis	Amount allowed by Commissioner as capital losses
840 shares common stock	U. S. Steel Corporation	$80,287.50	$43,390.84
204 shares common stock	American Telephone & Telegraph Company.	26,911.10	4,445.95
$25,000.00 face amount 4½% bonds due 1953.	Federal Land Bank (Louisville)	24,425.62	3,831.87
$8,000.00 face amount 4½% bonds due 1955.	Federal Land Bank (Columbia)	7,816.00	1,186.00

17. The amounts used by the Commissioner as the bases of these securities are the amounts which the Commissioner determined were the costs to the trustees of the securities described in paragraph 7 hereof, plus in the case of the stock of the American Telephone & Telegraph Company the amounts of $2,568.75 and $2,998.60, expended in obtaining on rights additional shares of said stock.

IV

18. On May 16, 1915, the date of the death of petitioner's father, he was the owner, among other securities, of 500
130 shares of the common capital stock of The Atchison, Topeka & Santa Fe Railway Company which had a fair market value on that date of $99.25 per share or a total value of $49,625.00.

19. On July 1, 1921, petitioner's father's executors transferred of record and delivered 100 of said 500 shares of the common capital stock of The Atchison, Topeka & Santa Fe Railway Company to the trustees of the trust provided for in "Article Twenty-first (D)" of petitioner's father's will. Thereupon the trustees deposited in the safe deposit vault referred to in paragraph 6 hereof, the certificates in the names of the trustees, representing said shares. On July 1, 1921, said 100 shares of The Atchison, Topeka & Santa Fe Railway Company's stock had a fair market value of $80.50 per share or an aggregate value of $8,050.00.

20. Thereafter, The Atchison, Topeka & Santa Fe Railway Company issued to its common stockholders of record on January 27, 1928, warrants entitling them to obtain one additional share of said common stock at $100.00 per share for each 25 shares then held by them. Accordingly, on February 15, 1928, the trustees of the aforesaid trust received a warrant entitling them to obtain four additional shares of said common stock. The rights embodied in said warrant were exercised by the trustees on April 16, 1928, and they obtained for $400.00 in cash four additional shares of the common stock of The Atchison, Topeka & Santa Fe Railway Company. At the time said rights were issued the respective values of stock and rights were as follows:

The stock per share	$189.625
Each right (25 rights being necessary to obtain one new share)	3.6875

131 21. Upon petitioner attaining the age of twenty-eight years on July 10, 1928, the trustees of said trust on that date, pursuant to "Article Twenty-first (D)" of the will, transferred of record and delivered the 104 shares of the common capital stock of The Atchison, Topeka & Santa Fe Railway

Company to the petitioner. On that date the shares of The Atchison, Topeka & Santa Fe Railway Company had a fair market value of 188½ per share.

22. On December 20, 1933, petitioner sold said 104 shares of The Atchison, Topeka & Santa Fe Railway Company stock for $5,509.94.

23. In her income tax return for the calendar year 1933 petitioner claimed $14,237.06 as a capital loss sustained on the sale of the 104 shares of stock of The Atchison, Topeka & Santa Fe Railway Company. This amount represented the difference between the sales price of said stock and the amount of $19,747.00 claimed by the petitioner to be the fair market value thereof on her twenty-eighth birthday.

24. In his notice of deficiency the Commissioner determined that the petitioner's capital loss on said sale was $2,940.06, which amount represented the difference between $8,050.00, the value of 100 shares of said stock on July 1, 1921, plus the $400.00 expended at the time of obtaining the four additional shares by the exercise of rights, and the sales price.

V

25. Upon the death of petitioner's father on May 16, 1915, he was the owner, among other securities, of the following, which on the date of his death had fair market values as set out below:

932 Quantity	Security	Unit value	Total value
$50,000.00 face value Corporate stock issued for water supply purposes (4's of May 1, 1959).	City of New York	96.50	$48,250.00
627 shares common stock	Southern Pacific Company	87.37496	54,784.12
500 shares common stock	Hotels Statler Company, Inc.	20.00	10,000.00
500 shares common stock	Union Pacific Railroad Co.	124.375	62,187.50

26. On April 16, 1921, Hotels Statler Company, Inc., declared a 60% dividend payable April 18, 1921, to its common stockholders of record April 14, 1921, in common stock of the company. The executors of the will of Seymour H. Knox, deceased, petitioner's father, being the holders of said 500 shares of common stock on April 14, 1921, received on or about April 18, 1921, in respect thereof 300 additional shares of said common stock.

27. On July 1, 1921, the executors of the will of petitioner's father transferred of record and delivered to the trustees of the trust provided for in "Article Twenty-first (D)" of the will, out of the securities mentioned in paragraphs 25 and 26,

the following securities, which on July 1, 1921, had the fair market values set out below:

133 Quantity	Security	Unit value	Total value
$10,000.00 face value Corporate stock issued for water supply purposes (4's of May 1, 1959).	City of New York	$79.50	$7,950.00
125 shares common stock	Southern Pacific Company	74.375	9,296.88
160 shares common stock	Hotels Statler Company, Inc.	75.00	12,000.00
100 shares common stock	Union Pacific Railroad Co.	117.875	11,787.50

Thereupon the trustees deposited in the safe deposit vault referred to in paragraph 6 hereof, said bonds and the certificates in the names of the trustees representing said shares.

28. When petitioner attained the age of twenty-eight years on July 10, 1928, the trustees of the trust provided for in "Article Twenty-first (D)" of petitioner's father's will transferred of record and delivered on that date to petitioner the securities mentioned in paragraph 27 hereof. On that date said securities had fair market values as set out below:

134 Quantity	Security	Unit value	Total value
$10,000.00 face value Corporate stock issued for water supply purposes (4's of May 1, 1959).	City of New York	$99.25	$9,925.00
125 shares common stock	Southern Pacific Company	120.25	15,031.25
160 shares common stock	Hotels Statler Company, Inc.	125.00	20,000.00
100 shares common stock	Union Pacific Railroad Co.	194.9375	19,493.75

29. On December 20, 1929, Hotels Statler Company, Inc., declared a 100% dividend payable December 23, 1929, to its stockholders of record on December 20, 1929, in common stock of that company. Accordingly, the petitioner being the owner on December 20, 1929, of said 160 shares of common stock received thereon on or about December 23, 1929, 160 additional shares of said common stock.

30. Petitioner sold the above-described securities on the dates and for the amounts set out below:

135 Date	Quantity	Security	Sales price
Dec. 21, 1933	$10,000.00 face amount Corporate stock issued for water supply purposes (4's of May 1, 1959).	City of New York	$7,837.50
Dec. 20, 1933	125 shares common stock	Southern Pacific Company	2,381.87
Dec. 21, 1933	320 shares common stock	Hotels Statler Company, Inc.	2,833.60
Dec. 20, 1933	100 shares common stock	Union Pacific Railroad Company	11,191.00

31. On her income tax return for the calendar year 1933 petitioner claimed as capital losses on the sales of the above securities the amounts set out below:

Quantity	Security	Amount claimed as basis	Amount claimed as capital loss
$10,000.00 face amount Corporate stock issued for water supply purposes (4's of May 1, 1959).	City of New York	$9,943.75	$2,106.25
125 shares common stock	Southern Pacific Company	15,281.25	12,899.38
320 shares common stock	Hotels Statler Company, Inc.	16,000.00	13,166.40
100 shares common stock	Union Pacific Railroad Company	19,500.00	8,309.00

136 The amounts claimed by the petitioner as the bases of said securities are the amounts which she claimed were the fair market values on the date she attained her twenty-eighth birthday of the securities described in paragraph 28.

32. The Commissioner of Internal Revenue in his notice of deficiency determined that petitioner sustained capital losses on the sale of these securities as follows:

Quantity	Security	Amount used by the Commissioner as basis	Amount allowed by the Commissioner as a capital loss
$10,000.00 face amount Corporate stock issued for water supply purposes (4's of May 1, 1959).	City of New York	$9,650.00	$1,812.50
125 shares common stock	Southern Pacific Company	9,296.88	6,915.01
320 shares common stock	Hotels Statler Company, Inc.	12,000.00	9,166.40
100 shares common stock	Union Pacific Railroad Company	11,787.50	596.50

The amounts thus used by the Commissioner as the bases of these securities were the amounts which the Commissioner then held were the fair market values on July 1, 1921, of the securities described in paragraph 27.

137 VI

33. The executors of the will of Seymour H. Knox, deceased, petitioner's father, purchased the following securities on or about the dates and for the amounts set out below:

Date	Quantity	Security	Unit price	Purchase price
July 1, 1916	$250,000.00 face amount (4's of 1946)	City of Philadelphia	$101.375	$253,437.50
Dec. 31, 1917	$50,000.00 face amount (4¼'s Jan. 1, 1933).	City of Auburn	102.2783	51,139.15
Mar. 4, 1918	$100,000.00 face amount (4½'s of Jan. 15, 1933).	City of Rochester	100.4125	100,412.50

34. On July 1, 1921, the executors of petitioner's father's will transferred of record and delivered to the trustees of the trust provided for in "Article Twenty-first (D)" of said will out of the securities mentioned in paragraph 33 hereof, the following securities which on July 1, 1921, had fair market values as set out below:

Quantity	Security	Amount
$50,000.00 face amount (4's of 1946)	City of Philadelphia	$50,687.50
$10,000.00 face amount (4¾'s Jan. 1, 1933)	City of Auburn	10,227.83
$20,000.00 face amount (4½'s of Jan. 15, 1933)	City of Rochester	20,082.50

138 Thereupon the trustees deposited said bonds in the safe deposit vault referred to in paragraph 6 hereof.

35. When petitioner attained the age of twenty-eight years on July 10, 1928, the trustees of the trust provided for in "Article Twenty-first (4)" of petitioner's father's will, pursuant to said will, transferred of record and delivered said securities on that date to petitioner. On that date said securities had the fair market values set out below:

Quantity	Security	Amount fair market value
$50,000.00 face amount (4's of 1946)	City of Philadelphia	$49,909.38
$10,000.00 face amount (4¾'s of Jan. 1, 1933)	City of Auburn	10,243.75
$20,000.00 face amount (4½'s of Jan. 15, 1933)	City of Rochester	20,371.41

36. On November 6, 1933, petitioner sold said bonds of the face amount of $50,000.00 of the City of Philadelphia (4's of 1946) for $42,930.41 in cash.

37. On January 1, 1933, said bonds of the face amount of $10,000.00 of the City of Auburn (4¾'s of January 1, 1933) and on January 15, 1933, said bonds of the fact amount of $20,000.00 of the City of Rochester (4½'s of January 15, 1933) matured and became payable and during the month of January, 1933, petitioner received on the redemption of said bonds of the City
139 of Auburn the sum of $10,000.00 and on the redemption of said bonds of the City of Rochester the sum of $20,000.00.

38. In her income-tax return for the calendar year 1933 petitioner claimed as capital losses on the above-mentioned bonds the amounts set out below:

Quantity	Security	Amount claimed as basis	Amount claimed as capital loss
$50,000.00 face amount (4's of 1946)	City of Philadelphia	$54,190.00	$11,259.59
$10,000.00 face amount (4¾'s of Jan. 1, 1933)	City of Auburn	10,227.83	227.83
$20,000.00 face amount (4½'s of Jan. 15, 1933)	City of Rochester	20,548.00	548.00

The amounts thus claimed as the bases of these bonds are the amounts which the petitioner claimed were the fair market values of said bonds on the date she attained her twenty-eighth birthday.

39. The Commissioner of Internal Revenue in his notice of deficiency, determined that petitioner sustained losses in respect of said bonds as follows:

140

Quantity	Security	Amount used by Commissioner as basis	Amount of Losses Allowed by Commissioner
$50,000.00 face amount (4's of 1946)	City of Philadelphia	$50,687.50	[1] $7,757.09
$10,000.00 face amount (4¾'s of Jan. 1, 1933)	City of Auburn	10,227.83	[2] 227.83
$20,000.00 face amount (4½'s of Jan. 15, 1933)	City of Rochester	20,082.50	[2] 82.50

[1] Capital loss.
[2] Ordinary loss.

The amounts used by the Commissioner as the bases of said bonds are the amounts which the Commissioner held were the values of said bonds on July 1, 1921.

VII

40. Some time prior to June 15, 1925, the executors of the will of petitioner's father purchased 1,068 shares of the common stock of Niagara, Lockport & Ontario Power Company at a cost of $22,642.88. On June 15, 1925, the executors transferred of record and delivered 214 of said shares of common stock of the Niagara, Lockport & Ontario Power Company to the trustees of the trust provided for in "Article Twenty-first (D)" of the petitioner's father's will. Thereupon the trustees deposited in the safe deposit vault referred to in paragraph 6 hereof, the certificates in the names of the trustees, representing said
141 shares. Said 214 shares of the Niagara, Lockport & Ontario Power Company stock had a fair market value on June 15, 1925, of $76.00 per share or an aggregate value of $16,264.00.

41. On August 1, 1925, the trustees exchanged the 214 shares of common stock of Niagara, Lockport & Ontario Power Company for 267½ shares of the $1.60 preferred stock and 267½

shares of the common stock without par value of Buffalo, Niagara & Eastern Power Corporation. Said exchange was nontaxable under Section 203 (b) (2) of the Revenue Act of 1924 and Section 112 (b) (3) of the Revenue Act of 1932. On the date of said exchange the fair market value of the common stock of Buffalo, Niagara & Eastern Power Corporation was $42.375 per share and the fair market value of the $1.60 preferred stock of said corporation was $24.375 per share.

42. On August 28, 1929, the trustees purchased 32½ additional shares of the common stock of Buffalo, Niagara & Eastern Power Corporation for $1,202.50. On the same date the trustees purchased 32½ additional shares of the $1.60 preferred stock of the par value of $25.00 per share of Buffalo, Niagara & Eastern Power Corporation for $780.25. On January 3, 1928, the trustees purchased 75 shares of the Class "A" stock of Buffalo, Niagara & Eastern Power Corporation for $1,500.00.

43. Upon petitioner attaining the age of twenty-eight years on July 10, 1928, the trustees transferred of record and delivered on that date to petitioner, pursuant to the will, the 300 shares of common stock, 300 shares of $1.60 preferred stock, and 75 shares of Class "A" stock of Buffalo, Niagara & Eastern Power Corporation.

142 44. On July 10, 1928, the securities mentioned in paragraph 43 had fair market values as set out below:

	Fair market value (per share)
Common Stock	$40.25
Class "A" Stock	37.50
Preferred Stock	26.25

45. On August 19, 1929, the petitioner exchanged said 300 shares of common stock of Buffalo, Niagara, & Eastern Power Corporation for 1,200 shares of the common capital stock of Niagara Hudson Power Corporation and 300 Niagara Hudson Power Corporation option warrants. On the same date the petitioner exchanged the 75 shares of Class "A" stock of Buffalo, Niagara & Eastern Power Corporation for 300 shares of the common capital stock and 75 option warrants of the Niagara Hudson Power Corporation. Said exchanges were nontaxable transactions under Sections 112 (b) (5) of the Revenue Acts of 1928 and 1932.

46. On August 19, 1929, the fair market values of the common stock and Class "A" option warrants of Niagara Hudson Power Corporation were $26.75 per share and $9.00 per warrant, respectively.

47. On August 8, 1932, pursuant to corporate action taken by the corporation to reduce its capital stock from 45,000,000 shares

of the par value of $10.00 each to 15,000,000 shares of the par value of $15.00 each, petitioner exchanged her 1,500 shares of old common stock of Niagara Hudson Power Corporation having a par value of $10.00 each for 500 shares of the new common stock having a par value of $15.00 each of said corporation,
143 reducing her holdings of said common stock to 500 shares, and exchanged her 375 option warrants of Niagara Hudson Power Corporation for 125 option warrants of said corporation. Said exchanges were nontaxable under the provisions of Section 112 (b) (3) of the Revenue Act of 1932.

48. On December 20, 1933, petitioner sold said 500 shares of the common stock of Niagara Hudson Power Corporation for $2,506.75, said 125 option warrants of said corporation for $40.24 and the 300 shares of the $1.60 preferred stock of Buffalo, Niagara & Eastern Power Corporation for $4,800.50.

49. In her income tax return for the calendar year 1933 petitioner claimed $12,340.51 as a capital loss on the sale of the 500 shares of common stock and 125 option warrants of Niagara Hudson Power Corporation, which amount was computed upon a claimed basis of $14,887.50, which was claimed by petitioner to be the value on her twenty-eighth birthday of the 300 shares of common stock and the 75 shares of Class "A" stock of Buffalo, Niagara & Eastern Power Corporation. In her income tax return for the calendar year 1933 petitioner claimed $3,037.00 as a capital loss on the sale of the 300 shares of the $1.60 preferred stock of Buffalo, Niagara & Eastern Power Corporation, which amount was computed upon a claimed basis of $7,837.50, which was claimed by the petitioner to be the fair market value of said stock on her twenty-eighth birthday.

50. The Commissioner of Internal Revenue in his notice of deficiency determined that the petitioner sustained a capital loss of $3,035.78 on the sale of the 500 shares of common stock and 125 option warrants of Niagara Hudson Power Corporation. In determining said amount the Commissioner held that the basis to petitioner of said securities was $5,582.77 computed as follows:

141 (1) That part of the cost to the executors of 214 shares of Niagara, Lockport & Ontario Power Com. any common stock which is allocable to 267½ shares of common stock of Buffalo, Niagara & Eastern Power Corporation (63.4831% of $4,537.06)	$2,880.27
(2) Cost to the trustees of the 32½ additional shares of the common stock of Buffalo, Niagara & Eastern Power Corporation	1,202.50
(3) Cost to the trustees of the 75 shares of Class "A" stock of Buffalo, Niagara & Eastern Power Corporation	1,500.00
Total	$5,582.77

51. In his notice of deficiency the Commissioner determined that the petitioner realized a capital gain of $2,363.46 on the sale of the 300 shares of $1.60 preferred stock of Buffalo, Niagara & Eastern Power Corporation. In determining said amount the Commissioner used as the basis of said stock $2,437.04 computed as follows:

(1) That part of the cost to the executors of the 214 shares of Niagara, Lockport & Ontario Power Company common stock which is allocable to 267½ shares of the $1.60 preferred stock of Buffalo, Niagara & Eastern Power Corporation (36.5169% of $4,537.06)	$1,656.79
(2) Cost to the trustees of the 32½ additional shares of the $1.60 preferred stock of Buffalo, Niagara & Eastern Power Corporation	780.25
Total	$2,437.04

145

VIII

52. Upon the death of petitioner's father on May 16, 1915, he was the owner, among other securities, of 19,080 shares of the common stock, par value of $100.00 per share, of the F. W. Woolworth Company. On May 16, 1915, the fair market value of said stock was $101.125 per share.

53. On June 1, 1920, petitioner's father's executors received an additional 5,724 shares of said stock as a stock dividend on the 19,080 shares, bringing their total holdings of said stock to 24,804 shares.

54. On July 1, 1921, the executors transferred of record and delivered 4,964 shares of the 24,804 shares of common stock of F. W. Woolworth Company to the trustees of the trust provided for in "Article Twenty-first (D)" of petitioner's father's will. Thereupon, the trustees deposited in the safe deposit vault referred to in paragraph 6 hereof, the certificates in the names of the trustees, representing said shares. On July 1, 1921, the fair market value of said stock was $110.00 per share, or an aggregate fair market value of $546,040.00.

55. On or about May 21, 1924, the F. W. Woolworth Company increased the number of its authorized shares of common stock from 1,000,000 to 4,000,000 and reduced the par value of each share from $100.00 to $25.00. In connection therewith the trustees during the month of June 1924, exchanged their holdings of 4,964 shares of the $100.00 par value common stock of F. W. Woolworth Company for 19,856 shares of the new $25.00 par value common stock of the company. Said exchange
146 was nontaxable under Sections 203 (b) (1) and (2) of the Revenue Act of 1924 and Sections 112 (b) (2) and (3) of the Revenue Act of 1932.

56. On January 29, 1925, the trustees purchased 144 additional shares of the $25.00 par value common stock of F. W. Woolworth Company for $16,344.00 in cash. Of these 144 shares, 125 thereof were sold by the trustees on December 16, 1925, for $25,035.00. Of the lot of 19,856 shares received on the exchange described in paragraph 55 hereof, the trustees on December 29, 1925, sold at a profit 125 shares for $25,736.22. Thereafter, the trustees purchased 250 additional shares of said stock on the dates and for the amounts set out below:

Date purchased	Number of shares	Purchase price
Jan. 15, 1926	50	$10,265.00
Jan. 16, 1926	100	20,330.00
Jan. 18, 1926	100	20,330.00

57. After the making of the purchases and sales set out in paragraph 56 hereof, the trustees held 20,000 shares of the $25.00 par value capital stock of F. W. Woolworth Company, received as follows:

	No. of shares
Received on the exchange described in paragraph 55 (19,856 less 125)	19,731
Received on the purchase of Jan. 29, 1925 (144 less 125)	19
Received on the purchases of Dec. 1929 (50, 100 and 100)	250
Total	20,000

147 58. On February 1, 1927 the trustees received a 50% stock dividend consisting of 10,000 shares of the $25.00 par value common stock of the F. W. Woolworth Company on their then holdings of 20,000 shares of such stock.

59. When petitioner attained the age of twenty-eight years on July 10, 1928, the trustees, pursuant to the will, transferred of record and delivered to petitioner on that date 15,000 shares of the $25.00 par value common stock of the F. W. Woolworth Company. Said 15,000 shares were out of the holdings of 19,856 shares received by the trustees on the exchange described in paragraph 55 hereof. The $25.00 par value common stock of F. W. Woolworth Company had a fair market value on July 10, 1928, of $183.125 per share.

60. On November 26, 1926, petitioner purchased 650 shares of the $25.00 par value common stock of F. W. Woolworth Company for $115,717.88. On February 1, 1927, petitioner received a 50% stock dividend consisting of 325 shares of the $25.00 par value stock on the 650 shares purchased as set forth above.

61. On January 27, 1927, petitioner purchased 25 shares of the $25.00 par value capital stock of F. W. Woolworth Company for $2,973.70.

62. On May 15, 1929, the F. W. Woolworth Company increased its authorized capital stock from $100,000,000.00, consisting of 4,000,000 shares of a par value of $25.00 per share, to $200,000,000.00, consisting of 20,000,000 shares of a par value of $10.00 per share. At the same time the company offered to issue to its stockholders shares of the new $10.00 par value stock in
148 exchange for the $25.00 par value stock then outstanding at the rate of 2½ shares of the $10.00 par value stock for each share of the $25.00 par value stock held by them. Thereupon petitioner exchanged her then holdings of 16,000 shares (consisting of the 15,000 shares received from the trustees as set out in paragraph 59 hereof and the 1,000 shares received as set out in paragraphs 60 and 61 hereof), of the $25.00 par value common capital stock of F. W. Woolworth Company for 40,000 shares of the $10.00 par value capital stock of that company. Identification of said 40,000 shares as being derived from particular acquisitions at certain times and with certain bases or prices was lost on said exchange. Said exchange was nontaxable under Sections 112 (b) (2) and (3) of the Revenue Acts of 1928 and 1932.

63. On the following dates petitioner sold 10,000 of said 40,000 shares of the $10.00 par value common stock of F. W. Woolworth Company in the amounts and for the prices stated:

Date of sale	Number of shares sold	Net sales price
Dec. 20, 1933	500	$20,077.50
Dec. 21, 1933	600	24,145.50
Dec. 22, 1933	2,800	109,241.25
Dec. 26, 1933	1,500	58,270.00
Dec. 27, 1933	3,000	118,165.00
Dec. 28, 1933	1,600	61,563.00
Total	10,000	$391,462.25

The shares sold as stated in this paragraph cannot be identified as being out of particular acquisitions.

149 64. In her income tax return for the calendar year 1933, petitioner claimed $278,854.33 as capital losses sustained on the sales mentioned in paragraph 63 hereof. In computing said amount petitioner used as the bases of said shares the sum of $670,316.58, consisting of the $118,691.58 cost to petitioner of the 1,000 shares received as set out in paragraphs 60 and 61 hereof and $551,625.00 which the petitioner claimed was the fair market value on July 10, 1928 of 3,000 of the 15,000 shares referred to in paragraph 59 hereof.

65. In his notice of deficiency (Exhibit A of the petition in this proceeding), the Commissioner of Internal Revenue held:

"An analysis of your account with the Woolworth stock shows that through the 2½ for 1 exchange in 1929 the identity of your various holdings in this stock was lost.

"Therefore, in accordance with article 600(4) of Regulations 77, the 10,000 shares sold in 1933 have been held to have come from the earliest acquisitions of the stock. This adustment, which comprises the greater portion of the increase of $701,089.97, is as follows:

7,500 shares of value at July 5, 1928, used by you	$551,625.00
2,500 shares cost to you in 1926, 1927	118,691.58
Total cost used by you	$670,316.58
Value as at July 1, 1921, of 666⅔ shares at 100 [1] (represented by the 10,000 shares sold)	73,333.33
Cost overstated	$596,983.25"

[1] Typographical error. This figure should be 110.

150 IX

66. On December 20, 1932, petitioner purchased $25,000.00 face amount of the corporate stock of the City of New York (4½'s issued May 1, 1907, interest payable on May 1 and November 1 of each year, maturity on May 1, 1957), paying therefor $23,500.00. On the same date petitioner purchased $25,000.00 face amount of the corporate stock of the City of New York (4½'s issued November 1, 1908, interest payable on May 1 and November 1 of each year, maturity on November 1, 1957), paying therefor $23,500.00. Both lots of bonds were registered securities.

67. On December 22, 1933, petitioner sold said $25,000.00 face amount of said bonds maturing May 1, 1957, for $20,875.00, and said $25,000.00 face amount of said bonds maturing November 1, 1957, for $20,875.00.

68. On December 23, 1933, petitioner purchased $10,000.00 face amount of the corporate stock of the City of New York (4½'s issued May 1, 1907, interest payable on May 1 and November 1 of each year, maturity on May 1, 1957), paying therefor $8,512.50. On the same date petitioner purchased $50,000.00 face amount of the corporate stock of the City of New York (4½'s issued March 1, 1913, interest payable on March 1 and September 1 of each year, maturity on March 1, 1963), paying therefor $41,875.00. The bonds purchased as stated in this paragraph were coupon bonds.

69. In her income tax return for the calendar year 1933 petitioner claimed $5,250.00 as ordinary losses sustained on the sale mentioned in paragraph 67 hereof.

70. In his notice of deficiency the Commissioner of Internal Revenue disallowed all of said amount of $5,250.00,
451 upon the ground that petitioner acquired substantially identical securities on December 23, 1933, and that such losses are not to be recognized under the provisions of Section 118 (a) of the Revenue Act of 1932.

X

71. Petitioner during the year 1933 made contributions in the amount of $3,321.80 to recipients of the kind described in Section 23 (n) of the Revenue Act of 1932. In the notice of deficiency the Commissioner of Internal Revenue has allowed petitioner a deduction in the full amount of such contributions.

72. The executors of the last will and testament of petitioner's father, Seymour H. Knox, deceased, and the trustees of the trust created under "Article Twenty-first (D)" of petitioner's father's will, complied with the provisions of said will and the requirements of the laws of the State of New York with respect to distributions of income including accumulated income.

73. The executors, the trustees and the petitioner at all times kept their respective books of account and filed their respective tax returns on a cash receipts and disbursements basis.

(Sgd.) RALPH M. ANDREWS,
Counsel for Petitioner.

(Signed) J. P. WENCHEL
Y.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

DDoc.

152 Exhibit A Annexed to Stipulation of Facts

LAST WILL AND TESTAMENT OF SEYMOUR H. KNOX

DATED MAY 12TH, 1915

LAST WILL AND TESTAMENT OF SEYMOUR H. KNOX

I, Seymour H. Knox, of the City of Buffalo, County of Erie and States of New York, being of sound mind and memory, do hereby make, publish, and declare this my last Will and Testament, in manner following, that is to say:

ARTICLE FIRST. I direct my executors, hereinafter named to pay all my lawful debts and funeral expenses. I direct my executors hereinafter named to pay from the funds in my estate any

transfer tax or taxes, or any collateral inheritance, succession, or legacy tax or taxes imposed by law at the time of my death, upon any and all property, or interest therein, passing under and by virtue of the terms of this my last Will and Testament, and I will and direct that all gifts, bequests, and devises herein mentioned shall be paid at the net amount herein stated without any deduction on account of any such tax or taxes.

153 ARTICLE SECOND. I hereby authorize and direct my executors hereinafter named to cause to be erected in Forest Lawn Cemetery, in the City of Buffalo, N. Y., a suitable monument or mausoleum at an expense of not exceeding Fifty thousand dollars ($50,000) therefor, to be paid from the funds of my estate.

ARTICLE THIRD. I give and devise unto my wife, Grace M. Knox, the house, stable, land, and premises and their appurtenances, situate on the easterly side of Delaware Avenue between Utica and Ferry Streets in the City of Buffalo, and now occupied by my wife and myself as a residence; to have and to hold the same unto my said wife, Grace M. Knox, and to her heirs and assigns forever.

I also give and bequeath unto my said wife, Grace M. Knox, all the pictures, furniture, rugs, books, ornaments, tableware, plate, silver, linen, and all other household furniture, and equipment, all jewelry and clothing, and also all horses, carriages, automobiles, and stable and automobile equipment owned by me at the time of my death (excepting only trotting-bred horses, sulkies, harnesses, and other equipment hereinafter mentioned and referred to in Article Eighth hereof).

ARTICLE FOURTH. I also give and bequeath unto my wife, Grace M. Knox, the sum of Two hundred fifty thousand dollars ($250,000) and I will and direct that said legacy be paid to my said wife in securities owned by me at the time of my death to be selected by her and taken by her at their appraised value.

ARTICLE FIFTH. I give and bequeath to my brother, Burtis L. Knox, now residing at Chaffee, Erie County, N. Y.,

154 fifty (50) shares of the common capital stock of F. W. Woolworth Company, a corporation organized under the laws of the State of New York; and in addition thereto, I give and bequeath to my said brother, Burtis L. Knox, an annuity of Twelve hundred dollars ($1,200) and direct my executors hereinafter named to pay over said annuity to my said brother in quarterly payments of Three hundred dollars ($300) each during his natural life. I direct my said executors to set aside the sum of Thirty thousand dollar' ($30,000) for the purpose of producing said annuity and at the death of my said brother,

I give, devise, and bequeath the property so set aside to produce said annuity unto my son, Seymour H. Knox, if he be then living; if not, to my daughters, Dorothy Knox and Marjorie Knox, to be divided between them, share and share alike.

Notwithstanding the foregoing provisions, I further will and direct that if on the 1st day of January, in the year Nineteen hundred and thirty-three, my said brother, Burtis L. Knox, shall be then living, that the annual payments to him shall then cease, and in that event I give, devise, and bequeath to said Burtis L. Knox, all of the property and estate then held to produce such income for his benefit, pursuant to the provisions of this Article Fifth of my last Will and Testament.

Article Sixth. I give and bequeath to my brother, Henry D. Knox, of the City of Buffalo, three hundred (300) shares of the common capital stock of F. W. Woolworth Company. I make no other provision for the benefit of my said brother, Henry D. Knox, for the reason that I have during my lifetime made other provision for his benefit.

Article Seventh. I give and bequeath unto Catherine Avery, cousin of my wife, who now resides at Los Angeles,
155 California, One hundred (100) shares of the common capital stock of said F. W. Woolworth Company.

Article Eight. I give and bequeath unto Benjamin F. White of East Aurora, five (5) of the trotting-bred horses owned by me at the time of my death; said horses to be selected by said Benjamin F. White. I also give and bequeath to said Benjamin F. White necessary harnesses for said horses so selected by him and two sulkies; said harnesses and sulkies to be selected by him from the harnesses and sulkies owned by me at the time of my death, and that the remaining trotting-bred horses, sulkies, and harnesses be sold as hereinafter provided.

Article Ninth. I give and bequeath to the Home for the Friendless, located in the City of Buffalo, N. Y., One hundred (100) shares of the common capital stock of said F. W. Woolworth Company; and to the Charity Organization of Buffalo, one hundred (100) shares of the common capital stock of said F. W. Woolworth Company.

Article Tenth. I give and bequeath unto the Buffalo Fine Arts Academy, five hundred (500) shares of the common capital stock of said F. W. Woolworth Company.

Article Eleventh. I give and bequeath to the Methodist Episcopal Church located at Russell, St. Lawrence County, N. Y., Fifty (50) shares of the common capital stock of said F. W. Woolworth Company, in trust nevertheless, for the following purposes: the said shares of stock so bequeathed to be held or sold

and the proceeds invested and, from time to time, reinvested, and the net income thereon used to assist in defraying the current expenses of said church.

156 ARTICLE TWELFTH. I give and bequeath unto William T. Damon, now in my employ, the full amount due or to become due to me upon a certain mortgage made by him to me and covering property situate on the shore of Lake Erie and in the Province of Ontario, Canada, and I direct my executors to cancel and discharge said mortgage.

ARTICLE THIRTEENTH. I give and bequeath unto Bankers Trust Company of Buffalo, a corporation organized under the laws of the State of New York, and doing business in the City of Buffalo, N. Y., and to Walter P. Cooke of the City of Buffalo, N. Y., Two thousand (2,000) shares of the common capital stock of said F. W. Woolworth Company, in trust nevertheless, for the following uses and purposes, to wit:

To receive, hold and, from time to time, in their discretion, to sell the same or portions thereof, and to invest and reinvest the same, or the proceeds thereof, and to collect the rents, income, issues, and profits on the property from time to time constituting such trust fund, and to pay over the net income arising therefrom in quarterly payments, to my sister, Carrie E. Fowler, during her natural life, and at the death of my said sister, Carrie E. Fowler, I give, devise, and bequeath the property then constituting such trust fund unto such person or persons and in such proportions as shall have been in that behalf appointed in and by the terms of the last Will and Testament duly executed of my said sister, Carrie E. Fowler, and in the event that my said sister, Carrie E. Fowler, shall fail to exercise such power of appointment, then at the death of my said sister, I give, devise, and bequeath the property constituting such trust fund unto her sons, Seymour K. Fowler and Raymond P. Fowler, share and share alike. In

157 case of the prior death of either of said sons, the issue of said deceased son to take the share to which the parent would have been entitled if living. And in case of the prior death of both Seymour K. Fowler and Raymond P. Fowler leaving no issue them surviving, I give, devise, and bequeath the property constituting said trust fund to my heirs.

Notwithstanding the foregoing provision, I further will and direct that in event that my said sister Carrie E. Fowler, is living on the 1st day of January, in the year Nineteen hundred and thirty-three, the trust hereby created for her benefit shall then terminate, and I give, devise, and bequeath to my said sister, Carrier E. Fowler, in that event, all of the property then constituting said trust fund.

ARTICLE FOURTEENTH. I give and bequeath unto my nephew, Seymour K. Fowler, son of my sister, Carrie E. Fowler, Three Hundred (300) shares of the common capital stock of said F. W. Woolworth Company.

ARTICLE FIFTEENTH. I give and bequeath unto said Bankers Trust Company of Buffalo, a corporation organized under the laws of the State of New York, and Walter P. Cooke of the City of Buffalo, N. Y., Three hundred (300) shares of the common capital stock of said F. W. Woolworth Company, in trust nevertheless, for the following uses and purposes, to wit:

To receive, hold and, from time to time, in their discretion, to sell the same or portions thereof and to invest and reinvest the same or the proceeds thereof, and to collect the rents, income, issues, and profits on the property from time to time constituting such trust fund to pay over the net income arising therefrom, semiannually, unto my nephew, Raymond P. Fowler, son of my sister Carrie E. Fowler, until he shall arrive at the age of
158 twenty-five (25) years, at which time I give and bequeath one-half of said trust fund to my nephew Raymond P. Fowler, and direct my said trustees to pay over one-half of such trust fund to him and thereafter to pay to my said nephew Raymond P. Fowler, the net income arising from the balance of said trust fund until he shall arrive at the age of thirty (30) years, at which time, I give, devise, and bequeath the balance of said trust fund to my said nephew, Raymond P. Fowler, and direct my said trustees to transfer and convey said property then constituting said trust fund to him. In case of the death of said Raymond P. Fowler before he shall arrive at the age of thirty (30) years, I give, devise, and bequeath whatever property may remain in said trust fund unto his children, if any, to be divided among them, share and share alike, and if he shall leave no children then living, I give, devise, and bequeath the balance of said trust fund to his brother, Seymour K. Fowler, if he then be living; if not, I give, devise, and bequeath the balance of said trust fund to my heirs.

ARTICLE SIXTEENTH. I give and bequeath unto Bankers Trust Company of Buffalo, a corporation organized under the laws of the State of New York, doing business in Buffalo, N. Y., and Walter P. Cooke of the City of Buffalo, N. Y., Two hundred fifty (250) shares of the common capital stock of said F. W. Woolworth Company, in trust nevertheless, for the following uses and purposes, to wit:

To receive, hold and, from time to time, in their discretion, to sell the same or portions thereof and to invest and reinvest the same or the proceeds thereof, and to collect the rents, issues, in-

come, and profits on the property from time to time constituting such trust fund and to pay over the net income arising
159 therefrom semiannually, unto my niece, Verona Knox, daughter of my brother, Burtis L. Knox, until she shall arrive at the age of thirty (30) years, at which time I give, devise, and bequeath the property constituting said trust fund to my said niece, Verona Knox. In case of the death of my said niece, Verona Knox, before arriving at the age of thirty (30) years, I give, devise, and bequeath the property then constituting said trust fund unto her children, if any then living, share and share alike. If she shall have no children then living, I give, devise, and bequeath said trust fund unto her sister, Ethel Knox, if she be then living; if not, then to my heirs.

ARTICLE SEVENTEENTH. I give and bequeath unto the Bankers Trust Company of Buffalo, a corporation organized under the laws of the State of New York, and doing business at Buffalo, N. Y., and Walter P. Cooke of the City of Buffalo, N. Y., Two hundred fifty (250) shares of the common capital stock of said F. W. Woolworth Company, in trust nevertheless, for the following uses and purposes, to wit:

To receive, hold and, from time to time, in their discretion, to sell the same or portions thereof and to invest and reinvest the same or the proceeds thereof, and to collect the rents, income, issues, and profits on the property, from time to time constituting such trust fund and to pay over the net income arising therefrom semi-annually, unto my niece, Ethel Knox, daughter of my brother, Burtis L. Knox, until she shall arrive at the age of thirty (30) years, at which time I give, devise, and bequeath the property constituting said trust fund to my said niece, Ethel Knox. In case of the death of my said niece, Ethel Knox, before arriving at the age of thirty (30) years, I give, devise, and bequeath the property
160 constituting said trust fund unto her children, if any, share and share alike. If she shall have no children then living, I give, devise, and bequeath said trust fund unto her sister, Verona Knox, if she be then living; if not, then to my heirs.

ARTICLE EIGHTEENTH. I give and bequeath unto each of the children of my brother, Henry D. Knox, who may be living at the time of my death One hundred (100) shares of the common capital stock of said F. W. Woolworth Company.

ARTICLE NINETEENTH. I give and bequeath unto each household servant employed in or about by homes at Buffalo and East Aurora, including chauffeurs and stable employes, who have been in my employ at the time of my death for upwards of one (1) year.

the sum of One hundred dollars ($100) to each such servant for each and every year of such continuous employment prior to the date of my death, and I will and direct that the determination of my executors as to who is entitled to receive the legacy under this Article of my last Will and Testament and the period of employment of each such person, and the amount of the legacy hereunder which each is to receive, shall be final and conclusive and binding upon all parties.

ARTICLE TWENTIETH. I give and devise unto my son, Seymour H. Knox, the real property constituting my farm and summer home located at East Aurora, N. Y., together with the residence and all barns and other buildings and structures situate thereon and all stable and farming equipment used or purchased for use in connection with the same.

ARTICLE TWENTY-FIRST. In determining the amount of my residuary estate for the purpose of making distribution thereof as hereinafter provided, I direct that there be first set aside the following property, to wit:

161

All the shares of the capital stock owned by me at the time of my death in the following corporations: The Marine National Bank of Buffalo, a banking corporation having its principal place of business in the City of Buffalo, N. Y.; Bankers Trust Company of Buffalo, a corporation organized under the laws of the State of New York, having its principal place of business in the City of Buffalo, N. Y.; The Central National Bank of Buffalo, a banking corporation having its principal place of business in the City of Buffalo, N. Y.; Bankers Trust Company, a corporation organized under the laws of the State of New York, having its principal place of business in the City of New York, N. Y.; Irving National Bank, a corporation having its principal place of business in the City of New York, N. Y.; The Chase National Bank, a corporation having its principal place of business in the City of New York, N. Y.; which capital stock I have by subdivision (C) of this Article numbered "Twenty first" of this my last Will and Testament, given and bequeathed to my brother, Henry D. Knox and Walter P. Cooke, in trust, for the benefit of my son, Seymour H. Knox.

All the rest, residue, and remainder of my property and estate, real, personal, and mixed, of every name, nature, and description, and wher'soever situate, but not including, however, the shares of the capital stock of the six corporations mentioned in the first paragraph of this Article Twenty-first of my last Will and Testament, I give, devise, and bequeath as follows:

(A) Forty (40) per cent thereof (not including, however, the shares of the capital stock of the six corporations

162 mentioned in the first paragraph of this Article Twenty-first), I give, devise, and bequeath unto my brother, Henry D. Knox and Walter P. Cooke, both of the City of Buffalo, N. Y., in trust nevertheless, for the following uses and purposes, to wit:

To receive, hold and from time to time, invest and reinvest the same, and to collect the rents, income, issues, and profits on the property from time to time constituting such trust fund and to pay over the net income arising therefrom quarterly unto my wife, Grace M. Knox, for and during the term of her natural life. At the death of my said wife, I give, devise, and bequeath one-half (½) of the property then constituting said trust fund unto such person or persons, corporation or corporations, and in such proportions as shall have been in that behalf appointed in the last Will and Testament, duly executed, of my said wife, Grace M. Knox; the remaining one-half (½) of the property constituting said trust fund, and in case my said wife shall have failed to exercise the power of appointment in reference to one-half (½) of said trust fund above mentioned, the entire property then constituting said trust fund, I will and direct shall be divided into three (3) equal parts or portions; one part or portion to be held by my said trustees for the benefit of my daughter, Dorothy Knox, and the net income thereon paid over to her semiannually, until she shall arrive at the age of th rty (30) years, at which time I give, devise, and bequeath said part or portion to my said daughter, Dorothy Knox; one part or portion to be held by my said trustees for the benefit of my son, Seymour H. Knox, and the net income thereon paid over to him semiannually, until he shall arrive at the age of thirty (30) years, at which time I give, devise, and bequeath said part or portion to my said son, Seymour H. Knox; one

163 part or portion to be held by my said trustees for the benefit of my daughter, Marjorie Knox, and the net income thereon paid over to her, semiannually, until she shall arrive at the age of thirty (30) years, at which time I give, devise, and bequeath said part or portion to my said daughter, Marjorie Knox. In case of the death of either or any of my said children before reaching the age of thirty (30) years, I give, devise, and bequeath the trust fund so held for the benefit of either or any of my said children, unto the issue of such deceased child or children, share and share alike, and in case either or any of my said children shall die before reaching the age of thirty (30) years leaving no issue surviving, then I give, devise, and bequeath the property constituting said trust fund so held for the benefit of such deceased child or children unto my children who may

then be living, to be divided between them share and share alike.

In the event that at the time of the death of my said wife Grace M. Knox, any or all of my children shall be less than twenty-one (21) years of age, I direct that only so much of the income payable to such child or children, shall be used for the support and education of such child or children as my trustees shall deem wise and proper and that the remainder of said income shall be accumulated during the minority of such child or children and paid over when each such child arrives at the age of twenty-one (21) years.

(B) Twenty (20) per cent of all the rest, residue, and remainder of my said estate (not including, however, the shares of the capital stock of the six corporations mentioned in the first paragraph of this Article Twenty-first) I give, devise, and bequeath to my brother Henry D. Knox and Walter P. Cooke, both of the City of Buffalo, in trust nevertheless, for the following uses and purposes, to wit:

164 To receive, hold and, from time to time, invest and reinvest the same, and to collect the rents, income, issues, and profits on the property from time to time constituting such trust fund and to pay over so much of the net income arising therefrom, as to my trustees shall seem wise and proper toward the support, maintenance and education of my daughter, Dorothy Knox, until she shall arrive at the age of twenty-one (21) years, and to accumulate the balance of the income during her minority for her benefit, and to pay over such accumulated income to her when she shall arrive at the age of twenty-one (21) years, and thereafter to pay over the entire net income to my said daughter Dorothy Knox, until she shall arrive at the age of twenty-eight (28) years, at which time I give, devise, and bequeath to my said daughter, Dorothy Knox, one-half (½) of the property then constituting said trust fund and I direct my said executors to pay over to my daughter, Dorothy Knox, the net income on the remaining one-half (½) of said trust fund until she shall arrive at the age of thirty-five (35) years, at which time I give, devise, and bequeath the remaining part of said trust fund to my said daughter, Dorothy Knox, and to her heirs and assigns forever.

In the event that my said daughter, Dorothy Knox, shall die before reaching the age of thirty-five (35) years, I give, devise, and bequeath any part or portion of said trust fund, which has not then been paid over to her, or to the possession of which at the time of her death she was not entitled, unto the issue of said Dorothy Knox, if any, surviving her, to be divided among

them, share and share alike. In case there be no issue her surviving, then I give, devise, and bequeath said trust fund unto her heirs.

(C) Twenty (20) per cent of said rest, residue, and remainder of my property and estate, I give, devise, and bequeath
165 unto my brother, Henry D. Knox and Walter P. Cooke, both of the City of Buffalo, N. Y., together with all of the capital stock owned by me at the time of my death in the following corporations, to wit: The Marine National Bank of Buffalo, a banking corporation having its principal place of business in the City of Buffalo, N. Y.; Bankers Trust Company of Buffalo, a corporation organized under the laws of the State of New York, having its principal place of business in the City of Buffalo, N. Y.; The Central National Bank of Buffalo, a banking corporation having its principal place of business at Buffalo, N. Y.; Bankers Trust Company, a corporation organized under the laws of the State of New York, having its principal place of business in the City of New York, N. Y.; Irving National Bank, a corporation having its principal place of business in the City of New York, N. Y.; and The Chase National Bank, a corporation having its principal place of business in the City of New York, N. Y., in trust nevertheless, for the following uses and purposes, to wit:

To receive, hold and, from time to time, invest and reinvest the same, and to collect the rents, income, issues, and profits on the property from time to time constituting said trust fund and to pay over so much of the net income thereon as to my said trustees shall seem wise and proper toward the support, maintenance and education of my son, Seymour H. Knox, until he shall arrive at the age of twenty-one (21) years, and to accumulate the balance of the income during his minority for his benefit, and to pay over such accumulated income to him when he shall arrive at the age of twenty-one (21) years, and thereafter to pay over the entire net income on said trust fund until he shall arrive at the age of twenty-five (25) years, at which time I give,
166 devise, and bequeath to my said son, Seymour H. Knox, a portion of said trust fund, to wit, Five hundred thousand dollars ($500,00), and direct my executors to pay over said sum of Five hundred thousand dollars ($500,000) to my said son, Seymour H. Knox, and thereafter to pay over the net income on the trust fund remaining in their hands to my said son until he shall arrive at the age of thirty (30) years, at which time I give, devise, and bequeath one-half (½) of the trust fund then remaining in the hands of my said trustees to my said son, Seymour H. Knox, and I direct my said trustees to transfer and convey the

same to him and thereafter to pay over the net income arising on the trust fund remaining in their hands to my said son, Seymour H. Knox, until he shall arrive at the age of thirty-five (35) years at which time I give, devise, and bequeath the balance of said trust fund unto my said son, Seymour H. Knox. In case of the death of my said son, Seymour H. Knox, prior to the time when he shall arrive at the age of thirty-five (35) years, I give, devise, and bequeath all of said trust fund which may not then have been paid over to him, or to the possession of which he may not at the time of his death have been entitled, unto his issue, if any, him surviving, to be divided among them, share and share alike. And in the event that there be no issue him surviving, I give, devise and bequeath the balance of said trust fund unto his heirs.

(D) Twenty (20) percent of all the rest, residue, and remainder of my said estate (not including, however, the shares of capital stock and of the six corporations mentioned in the first paragraph of this Article Twenty-first) I give, devise, and bequeath to my brother, Henry D. Knox and Walter P. Cooke, both of the City of Buffalo, in trust nevertheless, for the following uses and purposes, to wit:

167 To receive, hold and, from time to time, invest and reinvest the same, and to collect the rents, income, issues, and profits on the property from time to time constituting such trust fund and to pay over so much of the net income arising therefrom, as to my said trustees shall seem wise and proper toward the support, maintenance, and education of my daughter, Marjorie Knox, until she shall arrive at the age of twenty-one (21) years, and to accumulate the balance of the income during her minority for her benefit, and to pay over the accumulated income to her when she shall arrive at the age of twenty-one (21) years and hereafter to pay over the entire net income to my said daughter, Marjorie Knox, until she shall arrive at the age of twenty-eight (28) years, at which time, I give, devise, and bequeath to my said daught , Marjorie Knox, one-half (½) of the property then constituting said trust fund and I direct my said trustees to pay over the net income on the remaining one-half (½) of said trust fund until she shall arrive at the age of thirty-five (35) years, at which time I give, devise, and bequeath the remaining part of said trust fund to my said daughter, Marjorie Knox, and to her heirs and assigns forever.

In the event that my said daughter, Marjorie Knox, shall die before reaching the age of thirty-five (35) years, I give, devise, and bequeath any part or portion of said trust fund, which has not then been paid over to her, or to the possession of which at the time of her death she was not entitled, unto the issue of

said Marjorie Knox, if any, surviving her, to be divided among them, share and share alike. And in case there be no issue her surviving, then I give, devise, and bequeath said trust fund unto her heirs.

ARTICLE TWENTY-SECOND. I hereby grant unto the trustees of the various trusts created by this my last Will and
168 Testament, with the same force and effect as though these provisions were repeated separately in respect to each of said trusts, full power and authority to invest and, from time to time, reinvest all of the property and funds coming into the hands of my various trustees, in such property, stock, bonds, and other securities as to the trustees of each said trust shall seem wise and proper, whether or not such investments shall be those, which, under the laws of the State of New York, an executor and trustee is permitted to make, and without regard to limitations or restrictions, hereby giving and granting unto such trustees, full power and authority to receive from my executors and to retain as a part of the trust funds in their hands any and all stocks, bonds, or other securities, which may form a part of my estate at the time of my death, and which they shall receive from the executors thereof in the course of the distribution of my said estate, hereby granting unto my said trustees full power and authority to exchange any stocks, bonds, or other securities belonging to any trust for any stocks, bonds, or other property upon any consolidation, merger, or reorganization of any of the companies whose stocks or securities are so held by me at the time of my death, or which may form a part of any such trust fund at any time thereafter, and I hereby give and grant unto my said trustees full power and authority to sell, lease, convey, or dispose of any and all property, real, personal, or mixed, which may at any time form a part or any or all of said trust funds, and to execute leases, conveyances, and transfers thereof, on such terms and conditions as to them shall seem wise and proper.

It is my wish, however, which I hereby express to my trustees, that within five (5) years after my death the property constitut-
ing the various trusts hereby created shall be so invested
169 that at least fifty (50) per cent in value of each of said trust funds shall be invested in securities then constituting legal investments for savings banks, executors, or trustees, or in unencumbered real property situate in the retail business districts of cities of at least two hundred thousand (200,000) population, unless in the opinion of my said trustees additional time is required to accomplish such investments, and then, and in that event, I desire that such investments be made at an early date after the expiration of said five (5) years.

ARTICLE TWENTY-THIRD. In addition to the powers hereinbefore conferred upon the trustees of the various trusts created by the terms of this my last Will and Testament, I hereby grant full power and authority to my said trustees to invest portions of the trust funds of any of the trusts herein created in unencumbered real estate situate in the retail business districts of any cities in the State of New York, having a population of more than two hundred thousand (200,000), provided, however, that not more than twenty (20) percent of the value of any trust fund shall be at any one time so invested in real property.

ARTICLE TWENTY-FOURTH. I further will and direct that in the event that I shall own any or all of the following parcels of real estate, now owned by me, at the time of my death, that the same may be transferred by my executors to the trustees of any of the trusts created by the provisions of Article Twenty-first hereof, and accepted by said trustees as a part of said trust funds at the valuations fixed by the appraisers in the proceedings for determining the amount of the transfer tax under the laws of the State of New York:

The property known as Nos. 416–418 Main Street in the City of Buffalo, N. Y.;

170 The property known as Nos. 446–448 Main Street in the City of Buffalo, N. Y.;

The property now owned by me in the City of Kansas City, Mo.;

The property now owned by me in the City of Toledo, O.

The property now owned by me in the City of Akron, O.

It is my suggestion to my executors and trustees, although not binding in case changed conditions shall render it unwise, that the property known as Nos. 416–418 Main Street, in the City of Buffalo, N. Y., shall become a part of the trust created for the benefit of my daughter, Dorothy Knox, and that the property known as Nos. 446–448 Main Street, in the City of Buffalo, N. Y., shall become a part of the trust created for the benefit of my daughter, Marjorie Knox.

ARTICLE TWENTY-FIFTH. I hereby further authorize and empower my said executors, in the administration of my said estate to determine and make the division of my property and estate unto the various trust funds created by the provisions of Article Twenty-first hereof, as in their judgment shall seem wise and proper, and I further authorize any of my said trustees in the event of a division being necessary of any trust funds hereby created in accordance with the terms and direction of this Will, to make such division both of real and personal property, and to execute such conveyances and transfers as may be necessary to effect the same. The action of my executors and any of said

trustees, pursuant to the authority of this my last Will and Testament, to be binding upon all parties interested in my estate and in any such trust fund. I further will and direct that should any parcel of real estate owned by me at the time of my death become
171 a part of any of the trust funds created by the terms of Article Twenty-first of this my last Will and Testament, at the appraised value thereof, as hereinbefore stated, that the trustees of the remaining trusts created by the terms of said Article Twenty-first hereof, shall upon request, execute proper and suitable conveyances of their interest in said parcel or parcels of real estate, so as to effectually vest the title thereof in the trustees of the trust fund of which said parcel of real estate may become a part.

ARTICLE TWENTY-SIXTH. I hereby nominate, constitute and appoint my wife, Graee M. Knox, to be the executrix, and my brother, Henry D. Knox, and Walter P. Cooke, both of the City of Buffalo, to be the executors, of this my last Will and Testament, hereby giving and granting to my executors full power and authority to sell and convey any and all property, real, personal, or mixed, of which I may die seized or possessed, or in which I may have any interest. I hereby will and direct that no bond or other security shall be required of my said executors or of any of the trustees of the various trusts created by this my last Will and Testament. I hereby will and direct that my executors shall have three (3) years from and after my decease in which to settle my estate and to distribute the same in accordance with the provisions hereof, and may retain from time to time as a part of my estate any and all real property, stocks, bonds, securities, and other property, which may form a part of my estate at the time of my death, hereby granting unto my said executors full power and authority to exchange such stocks, bonds, or other securities for any other stocks, bonds, or other property upon any consolidation, merger, or other reorganization of any of the companies whose stocks or securities are so held.

I hereby authorize my executors and trustees to pay out of the income and revenues of my said estate, or of each
172 trust fund herein created, all taxes or assessments which shall be imposed or assessed upon the real or personal property belonging to my estate or to any such trust fund, all amounts necessary for insurance premiums, repairs, and generally all other expenses necessary or proper in the management or preservation of such trust funds or estate, each such trust fund bearing so far as practicable, its own burden.

I further will and direct that in view of the provisions herein contained for her benefit, that my wife, Grace M. Knox, serve as

executrix of this my last Will and Testament, without fees, commissions, or compensation, and I further will and direct that in lieu of the commissions and compensation provided by law, that each of my acting executors, administrators with the will annexed or trustees, whether herein appointed or appointed by the court, excepting only the Bankers Trust Company of Buffalo, as Trustee of the various trusts created by Articles Thirteenth, Fifteenth, Sixteenth, and Seventeenth hereof, shall during his service as such, receive an annual compensation of Twelve thousand dollars ($12,000) each, to be paid out of the income of my estate and the trust funds herein contained and apportioned ratably between the said estate and the said trust funds created by the provisions of Article Twenty-first hereof in substantial proportion to the value of the property contained in each, from time to time, such sum to be received in full payment for his services as such executor, administrator, and trustee under this Will, and to cover the entire services of each, both as executor, administrator, and trustee. I hereby expressly will and direct that the appointment of any other executor, trustee, or administrator with the will annexed which may be made by any court, shall be upon the express condition, that every such executor, trustee, or administrator, shall at the time of his appointment,
173 accept the compensation above provided for his services, in lieu of commissions or compensation provided by law. I will and direct that the Bankers Trust Company of Buffalo in acting as trustee of Articles Thirteenth, Fifteenth, Sixteenth, and Seventeenth hereof shall receive the usual commissions for such services as allowed by law.

Any executor or trustee, however, may during the period of his administration of my estate serve as director, officer, or attorney of corporations whose stocks, bonds, or other securities may form a part of my estate, or any trust fund, and may be compensated for such service by such corporations.

ARTICLE TWENTY-SEVENTH. I hereby will and direct that any reference contained in this my last Will and Testament to my executors or to my trustees shall be deemed and construed to refer with equal force to the survivor or survivors of any of my executors or to the survivor or survivors of any trustees of any trust fund herein mentioned, and to any additional executors or trustees when their appointment is effected. And I hereby nominate, constitute and appoint my son, Seymour H. Knox, to be one of the executors of this my last Will and Testament and one of the trustees of every trust herein created upon his reaching the age of twenty-one (21) years and with the same force and effect as though he were now included as an executor and as a trustee of each of the trusts hereby created, and subject to the

same provisions as to compensation as herein provided for my executors, other than my wife and the Bankers Trust Company of Buffalo.

ARTICLE TWENTY-EIGHTH. The provisions herein contained for the benefit of my said wife, Grace M. Knox, are to be accepted by her in lieu of any dower or right of dower in any real property of which I may die seized or possessed, or in which I may have any interest, and are also to be received by her in lieu of any right to receive fees, commissions, or other compensation as executrix of this my last Will and Testament.

ARTICLE TWENTY-NINTH. I hereby will and direct that no one of my children shall be charged with any advance or advancements made by me to such children during my lifetime.

ARTICLE THIRTIETH. It is my desire, if my executors approve, that all of my trotting-bred horses, harnesses, and sulkies, used in connection therewith, owned by me at the time of my death, excepting only such as may be selected by Benjamin F. White, pursuant to the provisions of Article Eighth hereof, be sold by my executors at the Easig-Tipton Sales in New York City.

ARTICLE THIRTY-FIRST. I will and direct that the income on the trusts created by Article Twenty-first of this will shall commence from the time of my death, and I authorize and direct my executors to make payments on account of said income in their discretion prior to the creation of the trusts, which payments shall be accepted by the beneficiaries in lieu of corresponding payments from the trustees.

ARTICLE THIRTY-SECOND. I direct that my executors be not required to file any inventory of my said estate.

I direct my executors to make, from time to time, at the request of any of the beneficiaries of any of the trusts herein created, semiannual statements certified by them, showing as to each beneficiary the condition of the trust estate in which he or she is interested, and the receipts, disbursements, sales, and investments in connection therewith.

ARTICLE THIRTY-THIRD. I hereby nominate, constitute, and appoint my wife, Grace M. Knox, to be the Testamentary Guardian of my three children, Dorothy Knox, Seymour H. Knox, and Marjorie Knox.

ARTICLE THIRTY-FOURTH. In case for any reason any legacy or devise herein contained shall lapse or shall become, for any reason whatever, incapable of performance, then and in that event, I give, devise, and bequeath such legacy and devise of real estate, in case any part of it shall consist of real estate, to my said wife, Grace M. Knox, knowing that she will, so far as possible, carry out my express desires in relation to the same.

ARTICLE THIRTY-FIFTH. I hereby revoke and forever annul any and all other will or wills and codicils thereto by me at any time made.

In witness whereof, I have hereunto set my hand and seal this twelfth day of May, in the year of our Lord one thousand nine hundred and fifteen (1915).

SEYMOUR H. KNOX. [SEAL]

The foregoing instrument, consisting of twenty-three (23) pages, was on the day of the date thereof, signed, sealed, published, and declared by the Testator therein named, as and for his last Will and Testament, in the presence of us and each of us, who at his request and in his presence and in
176 the presence of each other, have hereunto set our names as attesting witnesses thereto.

DAN'L J. KENEFICK,
Residing at Buffalo, N. Y.

GUY WELLMAN,
Residing at Buffalo, N. Y.

CHARLES H. TAYLOR,
Residing at Buffalo, N. Y.

177 *Respondent's exhibit A*

At a Surrogate's Court held in and for the County of Erie, State of New York, at the Surrogate's Office, in the City of Buffalo, in said County, on the 24th day of May 1921.

Present: Hon. LOUIS B. HART, Surrogate.

In the Matter of the Judicial Settlement of the Accounts of Grace M. Knox, Henry D. Knox, and Walter P. Cooke, as Executors of the Last Will and Testament of Seymour H. Knox, Deceased.

Grace M. Knox, Henry D. Knox, and Walter P. Cooke as Executors of the Last Will and Testament of Seymour H. Knox, late of the City of Buffalo, in said county, deceased, having heretofore presented to this court their petition praying for a judicial settlement of their accounts as such executors, dated December 20, 1920, and this court having thereupon duly issued a citation requiring the persons interested in the estate of said deceased named in said petition to be and appear in this court on the 1st day of February 1921, at ten o'clock in the forenoon of that day and attend the judicial settlement of the account of the said executors.

178 And satisfactory proof having been filed of the due service of said citation personally within the State on Dorothy Knox Goodyear, Seymour H. Knox, Marjorie Knox, and Grace M. Knox as appears by the affidavit of William C. Warren, Jr., verified the 7th day of January 1921, presented to and filed with this court, and said petitioners having presented to and filed with this court an instrument in writing signed by Burtis L. Knox, legatee, and a person interested in the estate of said deceased, acknowledged and approved as required by law, in which he waives the issue and service on him of a citation to attend said judicial settlement and consents to the making of this decree;

And Louis E. Desbecker, Esq., counselor at law, having been duly appointed special guardian for said Marjorie Knox, infant, by an order duly made in this proceeding by this court, and said Louis E. Desbecker having executed his written consent, to act as such special guardian, and having verified the usual affidavit of his ability to act as such special guardian and said consent and affidavit having been duly filed with said court in this proceeding, and this proceeding having been duly and regularly adjourned to this day and this day appeared the said petitioners in person and by Daniel J. Kenefick Esq., their attorney, and said Marjorie Knox having appeared by said Louis E. Desbecker, her special guardian, and by Grace M. Knox, her mother and guardian, and said Grace M. Knox, Henry D. Knox, and Walter P. Cooke as such executors having presented and filed their account, together with vouchers in support thereof, and said Louis E. Desbecker having executed his consent and recommendation in writing to the effect that the account submitted by the executors should be passed and judicially settled as filed
179 and that this decree submitted to him is in all respects satisfactory, which consent and recommendation is hereto attached and made a part of this decree.

Now on motion of Daniel J. Kenefick, Esq., attorney for said executors, and after hearing the proofs and allegations of the parties and examining said account and due deliberation having been had thereon,

I. It is ordered, adjudged, and decreed that the account of said Grace M. Knox, Henry D. Knox, and Walter P. Cooke as such executors, dated December 20, 1920, be and the same hereby is finally and judicially settled and allowed as filed and the Surrogate makes and records the following summary thereof:

The executors are debited and credited as follows:

DEBIT

With amount of Schedule A		$26,233,760.31

CREDIT

With amount of Schedule B	$20,671,098.49	
With amount of Schedule C	1,172,186.00	
With amount of Schedule D	551,755.95	
With amount of Schedule E	3,493,406.83	25,888,447.27
		$345,313.04

II. And it is further ordered that out of said balance the said executors pay to Louis E. Desbecker, Esq., the said special guardian, the sum of $5,000.00 hereby awarded him in full of his compensation for services rendered in this proceeding.

180 III. And it appearing to the satisfaction of this court that the executors were authorized and directed by Article Second of the will of the testator to cause to be erected in Forest Lawn Cemetery in the City of Buffalo, N. Y., a suitable monument and mausoleum at an expense of not exceeding $50,000, and that pursuant to said authority and direction, the executors have caused to be erected in Forest Lawn Cemetery in the City of Buffalo, N. Y., a mausoleum at an expense of $25,345.83,

It is ordered, adjudged, and decreed that the action of the executors in causing said mausoleum to be erected and in expending thereof the sum of $25,345.83 be and the same hereby is ratified and approved.

IV. And it appearing to the satisfaction of this court that the testator by the Eleventh clause of his will bequeathed to the Methodist Episcopal Church located at Russell, St. Lawrence County, New York, fifty shares of the common capital stock of F. W. Woolworth Company in trust for the following purposes, the shares of stock so bequeathed to be held or sold and the proceeds invested and from time to time reinvested and the net income thereon used to assist in defraying the current expenses of said church; and that in accordance with said request the executors on or about the 14th day of March 1916, transferred fifty shares of the common capital stock of the F. W. Woolworth Company to The Board of Trustees of the Methodist Episcopal Church of Russell, N. Y., upon said corporation entering into an agreement under seal to hold the same in trust for the purpose and upon the terms and conditions set forth in Article Eleventh of the will of the testator,

181 It is ordered, adjudged, and decreed that the action of the executors in transferring and delivering said stock to said corporation upon its executing said agreement, be and the same hereby is ratified and approved.

V. And it appearing that by the Fifth Article of the will of the testator, he had bequeathed an annuity of $1,200 per year to his brother, Burtis L. Knox, and directed his executors to pay over said annuity to said Burtis L. Knox in quarterly payments of $300 during his natural life, and that the testator directed his executors to set aside the sum of $30,000 for the purpose of producing said annuity and that at the death of said Burtis L. Knox, the testator devised and bequeathed the property so set aside to produce said annuity to his son, Seymour H. Knox, if he be then living, if not, to his daughters, Dorothy Knox and Marjorie Knox, to be divided between them share and share alike; and that he further provided that notwithstanding the foregoing provisions, in case said Burtis L. Knox should be living on the 1st day of January 1933, that in that event all the property held to provide such annuity should become the property of said Burtis L. Knox.

It is further ordered, adjudged, and decreed that said executors be and they hereby are ordered and directed to set aside $30,000 and to hold and invest the same for the purposes and upon the terms and conditions set forth in Article Fifth of the will of the testator and that such sum be deemed to have been set aside as of the death of the testator and the annual payment of $1,200 made in each year by the executors to said Burtis L. Knox shall be accepted by him with the same force and effect as though paid for the income derived from said sum of $30,000.

182 VI. The Surrogate notes that the trustees of the various trusts created by the will of the testator, including Seymour H. Knox, now of full age, have duly executed their oaths and consents to act as trustees of the several trusts, and that the same are on file in this court, and that Seymour H. Knox, having become of age has qualified as executor by executing his oath of office which is on file in this office.

VII. And it appearing from the account to the satisfaction of this court that the total amount of income received by the executors from the time of their appointment to the date of said account is $6,366,973.35, and that the expenses of administration, executors' compensation, taxes, etc., properly deductible therefrom amount to $538,912.36 leaving a net income of $5,828,860.99; and it further appearing that of said amount the sum of $1,109,896.89 represents income on the bank stock specifically bequeathed in trust for Seymour H. Knox by paragraph C of Article Twenty-

first of the will of the testator; and it further appearing that the balance of the net income after deducting an annuity of $1,200 per year payable to Burtis L. Knox should be divided as follows: Grace M. Knox, 40%; Dorothy Knox Goodyear, 20%; Seymour H. Knox, 20%; and Marjorie Knox, 20%; and that during the period embraced in this accounting the whole of said income has not been so distributed and that the said parties are entitled to interest on the undrawn portion of their distributive shares thereof as follows:

Seymour H. Knox	$141,105.49
Grace M. Knox	56,453.48
Dorothy Knox Goodyear	46,789.79
Marjorie Knox	71,335.96
Total	$315,684.72

183 which said amount, together with said sum of $1,109,896.89 payable to Seymour H. Knox as aforesaid, should be deducted from said net income, leaving a balance of $4,402,479.38 to be distributed as follows:

40% to Grace M. Knox	$1,760,991.75
20% to Seymour H. Knox	880,495.87
20% to Dorothy Knox Goodyear	880,495.88
20% to Marjorie Knox	880,495.88

And it further appearing that the payments on account of income during the period covered by this accounting are as follows:

Grace M. Knox	$1,319,979.89
Seymour H. Knox	669,105.66
Dorothy Knox Goodyear	449,774.67
Marjorie Knox	260,422.11

And it further appearing that during the period covered by this accounting the executors have expended certain moneys for bank stocks for Seymour H. Knox having in his behalf exercised certain rights to purchase stock coming to them by virtue of the holdings of stocks specifically bequeathed for him and that the amount of money so invested less the cash distribution of principal received by virtue of said holdings, amounts to $41,512.98, which should be deducted from income due him.

And it further appearing that the amount now due to each of said interested parties on account of income to the date of the report is as follows:

184	Grace M. Knox 40% of net income	$1,760,991.75
	Interest	56,453.48
		1,817,445.23
	Less amount drawn	1,319,979.89
	Balance due	497,465.84

Seymour H. Knox 20% of net income	$880,495.87
Interest on undrawn income	141,105.49
Bank dividends	1,109,896.89
	2,131,498.25
Less amount drawn	669,105.66
Balance	1,462,392.59
Less bank investments	41,512.98
Balance due	1,420,879.61
Dorothy Knox Goodyear 20% of net income	880,495.88
Interest on undrawn income	46,789.79
	927,285.67
Less amount drawn	449,774.67
Balance due	477,511.00
Marjorie Knox 20% of net income	880,495.88
Interest on undrawn income	71,335.96
	951,831.84
Less amount drawn	260,422.11
Balance due	691,409.73

185 It is further ordered, adjudged, and decreed that the executors pay to Grace M. Knox, Seymour H. Knox, Dorothy Knox Goodyear, and Marjorie Knox, the above mentioned balances in full of all unpaid income and interest thereon due to the date of this accounting and that up to the sum of $477,511, being the lowest amount of said income payments due, the executors pay the same by transferring and delivering to the parties entitled thereto bonds belonging to the estate at their appraised value or cost, and that the balance of said amounts be paid in cash or at the election of the parties entitled to receive said payments in securities at their appraised value or cost, but at no lesser value than present market.

And it is further ordered, adjudged, and decreed that the above balance of $691,409.73 directed to be paid to Marjorie Knox be paid to Henry D. Knox, Walter P. Cooke, and Seymour H. Knox as Trustees for Marjorie Knox, and that the same be paid $477,511 in bonds and the balance in cash or securities as hereinabove directed.

VIII. And it appearing to the satisfaction of this Court that the sales, purchases, and exchanges of properties and securities made by executors during the period embraced by this account were in accordance with the authority vested in them by the will of the testator, and were also to the best interest of said estate and the persons interested therein,

It is ordered, adjudged, and decreed that the action of the executors in making the various exchanges, purchases, and sales of properties and securities as set forth in said account be and the same hereby are ratified and approved.

186 IX. And it is further ordered, adjudged, and decreed that all payments of income made by the executors or herein directed to be made by them, shall be construed to be and shall be accepted by the various interested parties as payments of income on account of their respective interests in the estate and in the trusts created for their benefit with the same force and effect as though paid to them by the Trustees named in said Last Will and Testament of Seymour H. Knox, deceased, and said trustees shall be and they hereby are relieved and exonerated from paying to the said interested parties any income on said trusts funds for the period covered by said account.

X. And it appearing by Article Twenty-fourth of the will of the testator that it was the wish of the testator that the property known as 416–418 Main Street in the City of Buffalo, New York, should become a part of the trust created for the benefit of Dorothy Knox Goodyear, and that the property known as 446–448 Main Street, Buffalo, N. Y., should become a part of the trust created for the benefit of Marjorie Knox,

It is ordered, adjudged, and decreed that the executors transfer and convey to Henry D. Knox, Walter P. Cooke, and Seymour H. Knox, as Trustees for the benefit of Dorothy Knox Goodyear, pursuant to the provisions of paragraph B of Article Twenty-first of said will said property known as 416–418 Main Street in the City of Buffalo, New York, at the value of $414,000, being the appraised value thereof.

And it is further ordered, adjudged, and decreed that the executors transfer and convey to Henry D. Knox, Walter

187 P. Cooke, and Seymour H. Knox as trustees for the benefit of Marjorie Knox, pursuant to the provisions of paragraph D of Article Twenty-first of said will said property known as 446–448 Main Street in the City of Buffalo, N. Y., at the value of $464,439.89, being the appraised value of said property plus the cost of improvements made by the executors.

XI. It is further ordered, adjudged, and decreed that the executors in their discretion distribute the balance of the real estate in their hands at the appraised value of the several parcels between the trust created for the benefit of Grace M. Knox by the provisions of paragraph A of Article Twenty-first of the will of the testator and the trust created for the benefit of Seymour H. Knox pursuant to the provisions of Paragraph C of Article Twenty-first of the will of the testator.

And it is further ordered, adjudged, and decreed that the executors on conveying the real estate to the various trusts or so much as they may determine to convey to the trusts, shall concurrently therewith transfer to the trustees of each of said four trusts, sufficient securities belonging to the estate at their appraised value or cost to equalize the difference in the value of the parcel or parcels of real estate received by each of said trusts, to the end that the appraised value of such real estate and such securities so transferred to equalize such value shall be equal as to each of such trusts except that the trust created for the benefit of Grace M. Knox shall be twice the amount of either of the others.

XII. And it appearing further that the testator by the provisions of Article Twenty-fifth of his said will has authorized and empowered his executors in the administration
188 of his said estate to determine and make division of his property and estate among the various trust funds created by the provisions of Article Twenty-first thereof as in their judgment shall seem wise and proper.

It is further ordered, adjudged, and decreed that the executors shall from time to time as in their judgment seems wise and proper, make division of the property and estate remaining in their hands, or so much thereof as from time to time they think wise, after making provision for carrying out the terms and conditions of this decree into the various trust funds created by the provisions of said last will and testament and in accordance with the terms thereof, any balance of cash or property remaining in the hands of the executors to be subject to the payment therefrom of any further debts or obligations of the testator and the expenses of administration and final distribution in accordance with the terms of said will.

And it is further ordered, adjudged, and decreed, that from and after the creation of said trust funds the executors and trustees may in their discretion apportion the expenses of administration and the other disbursements among the four trusts hereinbefore mentioned and the estate, so long as any portion of said estate remains undivided.

The Surrogate notes that the executors have this day filed in this court receipts and releases duly executed by the following named legatees showing full payment of the several specific bequests to them contained in the will of the testator: Henry D. Knox, Burtis L. Knox, Catherine Avery, The Home of the Friendless, the Charity Organization Society of Buffalo,
189 Buffalo Fine Arts Academy, William T. Damon, Sey-

mour K. Fowler, Sherman Damon, Charles Knowlton, Bertha L. Daigler, Lucy Kranichfeld, Margaret Reilly, Benjamin F. White, (2) Paul J. Kingston, John Thoman, William Timm, Herman Timm, Edward Kingston, Louis Sissler, Charles Curtis, Charles Sissler, Aloise Burghardt; also receipt and release duly executed by Henry D. Knox, General Guardian of Pricilla Knox, Alice Knox, and James H. Knox, showing full payment of the specific bequests to them contained in the will of the testator; also receipts and releases duly executed by Bankers Trust Company of Buffalo and Walter P. Cooke, as trustees, showing the receipt by them of the property bequeathed in trust by the will of the testator for Verona Knox, Ethel Knox, Carrie D. Fowler, and Raymond P. Fowler; also receipt and release executed by the Board of Trustees of the Methodist Episcopal Church of Russell, N. Y., showing the receipt of the property specifically bequeathed in trust by the will of the testator, together with an agreement executed by the Board of Trustees of the Methodist Episcopal Church of Russell, N. Y., to hold said property in trust in accordance with the terms of the will of the testator.

L. B. HART, *Surrogate.*

STATE OF NEW YORK,
County of Erie, Surrogate's Office, ss.:

I, George T. Vandermeulen, Clerk of the Surrogate's Court of the said county of Erie, do hereby certify that I have compared the foregoing and annexed copy of Decree—in the
190 matter of the judicial settlement of the accounts of Grace M. Knox, Henry D. Knox, and Walter P. Cooke, as executors of the Last Will and Testament of Seymour H. Knox, deceased, with the original record thereof now remaining in this office, and have found the same to be a correct transcript therefrom, and of the whole of such original record.

[SEAL]

In witness whereof, I have hereunto set my hand and affixed the seal of said Surrogate's Court, at Buffalo, N. Y., this 12th day of December 1938.

No. 53273.

G. T. VANDERMEULEN
Clerk of Surrogate's Court.

[Surrogate's Court, Erie County. In the Matter of the Judicial Settlement of the Accounts of Grace M. Knox and others as executors of vs. Seymour H. Knox, Deceased. Decree.]

191 Before United States Board of Tax Appeals

MARJORIE K. CAMPBELL, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 84639. Promulgated May 19, 1939

1. Basis.—Personal property, not specifically bequeathed to a taxpayer but distributed to her from a trust created by and in accordance with the will of her father, takes as its basis for gain or loss in her hands its fair market value at the time of the distribution, regardless of whether it was owned by the father at the date of his death, purchased by the executors, or purchased by the trustees. The third sentence of section 113 (a) (5) of the Revenue Act of 1932 applies and not the provisions of section 113 (a) (4) or the general provision of (a).

2. "First In, First Out."—Such property is not "first in," as compared with other like shares purchased by the taxpayer individually prior to the distribution, for the purpose of the first in, first out rule.

3. Wash Sales—Substantially Identical.—Bonds sold on one day and bonds purchased on the following day were not substantially identical within the meaning of section 118 of the Revenue Act of 1932, where there was a difference in their date of issuance of not less than four years and five month, a difference in their date of maturity of not less than five years and five
192 months, a difference in the dates upon which interest was payable, a difference of 1⅜ in the market price of the bonds, and where one lot of bonds was registered while the other bore coupons.

R. M. Andrews, Esq., John L. Kenefick, Esq., and Ernest J. Brown, Esq., for the petitioner. W. H. Schwatka, Esq., and E. L. Updike, Esq., for the respondent.

Opinion

MURDOCK: The Commissioner determined a deficiency of $86,937.47 in the income tax of the petitioner for the calendar year 1933. The Board adopts as its findings of fact the stipulation filed by the parties, together with the respondent's exhibit A.

ISSUE I

The petitioner disposed of certain securities in the taxable year which she had received as a distribution from a trust set up by her father's will. The Board is asked to determine her basis

for gain or loss on those securities. She contends that the basis was the fair market value of the securities at the time they were distributed to her from the trust, whereas the Commissioner contends that her basis was the same as that of the trust, that is, cost to the trust of those purchased by the trust and fair market value at the date received by the trust of those which were transferred to the trust by the decedent's executors.

Seymour H. Knox, the father of the petitioner, died on May 16, 1915. His will provided that the residuary estate
193 should be divided into four parts and that one part, consisting of 20 percent of the whole, should be placed in trust for this petitioner. The will provided with respect to the portion placed in trust for this petitioner that it was so placed for the following uses and purposes:

To receive, hold and, from time to time, invest and reinvest the same, and to collect the rents, income, issues, and profits on the property from time to time constituting such trust fund and to pay over so much of the net income arising therefrom, as to my said trustees shall seem wise and proper toward the support, maintenance and education of my daughter, Marjorie Knox, until she shall arrive at the age twenty-one (21) years, and to accumulate the balance of the income during her minority for her benefit, and to pay over the accumulated income to her when she shall arrive at the age of twenty-one (21) years, and thereafter to pay over the entire net income to my said daughter, Marjorie Knox, until she shall arrive at the age of twenty-eight (28) years, at which time, I give, devise, and bequeath to my said daughter, Marjorie Knox, one-half (½) of the property then constituting said trust fund and I direct my said trustees to pay over the net income on the remaining one-half (½) of said trust fund until she shall arrive at the age of thirty-five (35) years, at which time I give, devise, and bequeath the remaining part of said trust fund to my said daughter, Marjorie Knox, and to her heirs and assigns forever.

In the event that my said daughter, Marjorie Knox, shall die before reaching the age of thirty-five (35) years, I give,
194 devise, and bequeath any part or portion of said trust fund, which has not then been paid over to her, or to the possession of which at the time of her death she was not entitled, unto the issue of said Marjorie Knox, if any, surviving her, to be divided among them, share and share alike. And in case there be no issue her surviving, then I give, devise, and bequeath said trust fund unto her heirs.

It is further provided that the trustees should have full power to sell, exchange, or dispose of any property in the trust fund,

and expressed the wish of the testator that within five years after his death, or as soon thereafter as possible, 50 percent of the value of the trust fund should be invested in securities constituting legal investments for executors or trustees or in unencumbered real property.

The trust was formally set up on July 1, 1921, and the executors on that date transferred to the trustees the property as provided in the will. The petitioner attained the age of twenty-eight years on July 10, 1928, and received on that date one-half of the property then constituting the trust fund. Certain of the securities which she received at that time were sold during 1933 and certain of the bonds matured and were paid during 1933. Some of the securities sold by her had been held by her father at the time of his death, others had been purchased by the executors, and still others had been purchased by the trustees. The Commissioner, in his determination of the deficiency, used as the basis for gain or loss for securities owned by the decedent at the time of his death, and for securities purchased by the executors, the fair market value thereof on July 1, 1921, and, in the case of securities purchased by the trustees, the cost thereof to the trustees.

The petitioner correctly contends that the proper basis is
195 the fair market value of the securities on July 10, 1928, when they were distributed to her pursuant to her father's will. She acquired the property in question by the will of her father. It was personal property and was not acquired by specific bequest. Section 113 (a) (5) of the Revenue Act of 1932 provides that the basis for gain or loss on such property is the fair market value of the property at the time of the distribution to the taxpayer. Section 113 (a) (4) by its express terms does not apply. Neither does the general rule of (a) apply. The question presented here has been decided adversely to the contention of the respondent in a number of cases, several of which have been reviewed and affirmed by the appellate courts. Ralph W. Harbison, 26 B. T. A. 896; Mary Colgate, 27 B. T. A. 506 (both of the above were reversed on other grounds, 293 U. S. 144); Lillian McDonald Brinton, 28 B. T. A. 472; Harry G. Haskell, 30 B. T. A. 855; affd., 78 Fed. (2d) 869; James W. Arrott, Jr., 34 B. T. A. 133; Robert A. Taft, Trustee, 34 B. T. A. 603; affd., 101 Fed. (2d) 1007 (1/10/39); Bessie C. Williamson, 34 B. T. A. 668 and 924; affd., 100 Fed. (2d) 735; Margaret E. B. Fleming, 36 B. T. A. 773; Richard Van Nest Gambrill, 38 B. T. A. 981; Van Nostrand v. United States, 18 Fed. Supp. 295; affd., 94 Fed. (2d) 410; Commissioner v. Libbey, 100 Fed. (2d) 458. The respondent has filed a lengthy

and thoughtful brief, but he does not distinguish the present case from the cases just cited, he is unable to cite any authority which was not fully considered in those cases, and he makes no argument which might cause the Board to change its position. Therefore, we follow the cited cases and hold for the petitioner.

ISSUE II

The petitioner had certain securities which she had purchased prior to July 10, 1928. She received from the trustees
196 on July 10, 1928, some more of the same kind of shares. She sold some of the shares in 1933. She applied the "first in, first out" rule in making up her return for 1933 and regarded her individual purchases as the stock first purchased, used the basis applicable to those shares until it was exhausted, and then used as the basis for the remaining shares sold the fair market value of the shares on July 10, 1928. The Commissioner, in determining the deficiency, held that the first shares purchased were those received from the trustees since, as a matter of fact, they were purchased by the trustees prior to the date upon which the petitioner had purchased her similar shares.

The parties are in agreement that the first in, first out rule must be applied, since the shares which the petitioner sold cannot be identified as those purchased at any particular time. They disagree, however, as to which stock was the "first in." The rule appears in the regulations, not in the statute, and provides that "when shares of stock in a corporation are sold from lots purchased at different dates or at different prices and the identity of the lots cannot be determined, the stock sold shall be charged against the earliest purchases of such stock." Neither party has suggested any statutory provision which has any bearing upon the question. There are provisions in section 101 (c) (8) defining capital assets which state that the period for which a taxpayer has held property shall include, under certain circumstances, the period during which it was held by a prior owner. None of those provisions, either by their purpose or by their express wording, would have any application to the stock in question. The rule should receive a practical and reasonable application. It means purchased by the particular taxpayer. A person should not be deemed to have purchased property prior
197 to the time that he purchased it or acquired the title to it, unless there is some express statutory provision to that effect. The estate of the decedent and the trust are governed by the laws of the State of New York. The petitioner has pointed out that she did not acquire any vested interest in the trust property until it was distributed to her on July 10, 1928.

Certainly she had not acquired the particular shares and she did not hold those shares prior to that date. The Commissioner has apparently proceeded on the theory that purchase by the trust was, for tax purposes, purchase by the petitioner. He has attributed to the petitioner the same basis that the trust would have had, and he has attributed to the petitioner the period of holding that the trust had. He may have been consistent in that. The trust, however, was a separate taxable entity and must be kept separate from this petitioner in the absence of any statutory provision to the contrary. It had complete ownership of these shares up to the very moment of the distribution. We have held that the basis for gain or loss on the shares was not that of the trust, but was the fair market value of the shares at the time they were distributed by the trust to the petitioner. The second contention of the respondent must fall with the first. The date of "purchase" of those shares by the petitioner for the purpose of applying the first in, first out rule was July 10, 1928. Cf. Helvering v. San Joaquin Fruit & Investment Co., 297 U. S. 496. Decision on this point is for the petitioner.

ISSUE III

The petitioner purchased $25,000 face amount of the corporate stock of the city of New York on December 29, 1932. Such so-called stock is, for all present purposes, the equivalent of bonds.

It was issued on May 1, 1907, will mature on May 1, 1957,
198 and paid interest at the rate of 4½ percent semiannually on May 1 and November 1. She purchased a like amount of somewhat similar stock on the same day, the difference being that the second lot were issued on November 1, 1908, and will mature on November 1, 1957. Each purchase consisted entirely of registered securities. She sold both lots of stock on December 22, 1933.

She purchased on the following day $10,000 face amount of the corporate stock of the city of New York issued May 1, 1907, maturing on May 1, 1957, paying interest at the rate of 4½ percent semiannually on May 1 and November 1. She concedes that this purchase was of substantially identical stock or securities and that the wash sales provision of section 118 of the Revenue Act of 1932 applies.

She purchased on December 23, 1933, an additional $50,000 face amount of the corporate stock of the city of New York. The stock involved in this purchase was issued on March 1, 1913. It matures on March 1, 1963. Interest at the rate of 4½ percent thereon was payable on March 1 and September 1 of each year.

These bonds were coupon bonds. The Commissioner, in determining the deficiency, held that they were substantially identical securities to those sold on the previous day and he disallowed the entire loss which the petitioner realized from the sales made on December 22.

The petitioner contends that there was no wash sale in regard to $40,000 face amount of the bonds which she sold on December 22 because the $50,000 face amount of bonds purchased on December 23 were not substantially identical stock or securities to any of those sold. She points to the following differences between the bonds:

1. A difference in the date of issuance—five years and ten months in the one case and four years and five months in the other.

199 2. A difference in date of maturity—five years and ten months in one case and five years and five months in the other.

3. A difference in the dates upon which interest was paid, from May and November to March and September.

4. The bonds sold were registered, while those purchased bore coupons.

5. A difference of 1⅜ in the market price of the bonds on December 23.

She cites I. T. 2672, C. B. XII–1, p. 72, wherein the Treasury ruled that bonds having different dates of issue, different dates of interest payments, different dates of maturity, and different unit values, although otherwise similar, are not substantially identical securities within the meaning of section 118 of the Revenue Act of 1932. The Commissioner cites no authority which is directly in point or even closely analogous. His argument is not supported by the facts and is mostly irrelevant. The petitioner points out that in Marie Hanlin, 38 B. T. A. 811, the Board entered into a lengthy discussion of the meaning of "substantially identical stock or securities" and went so far as to hold that bonds having a difference of only two and one-half years in dates of maturity, but redeemable at the option of the obligor at any time after about six months, were substantially identical, but said:

"If there was an unconditional positive difference of two and one-half years in the maturity or redeemability of the bonds a more difficult question as to the substantiality of the difference might arise."

200 The differences between the bonds here in question were greater than the differences between the bonds involved in the Hanlin decision, and that difference serves to distinguish

the two cases. Section 118 does not apply and the petitioner is entitled to deduct the loss sustained from the sale of $40,000 face amount of the bonds.

Reviewed by the Board.

Decision will be entered under Rule 50.

201 Before United States Board of Tax Appeals

Docket No. 84639

[Same title.]

Decision

The respondent on June 13, 1939, filed a proposed computation pursuant to the Board's Opinion promulgated May 19, 1939. The petitioner on June 23, 1939, filed a notice of acquiescence to the respondent's computation. Therefore, it is

Ordered and decided, that there is no deficiency in income tax for the year 1933.

[SEAL] (Signed) J. E. MURDOCK,
Member, United States Board of Tax Appeals.

Enter:

Entered June 30, 1939.

_____,
U. S. Board of Tax Appeals.

Filed Sept. 22, 1939.

202 In United States Circuit Court of Appeals for the Second Circuit

B. T. A.—Docket No. 84639

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
PETITIONER ON REVIEW

v.

MARJORIE K. CAMPBELL, RESPONDENT ON REVIEW

Petition for review and assignments of error

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Now comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Sammuel O. Clark, Jr., Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and Claude R. Marshall, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I

JURISDICTION

That the petitioner on review (hereinafter referred to as the Commissioner) is the duly appointed, qualified, and acting Commissioner of Internal Revenue, appointed and holding his office by virtue of the laws of the United States; that the
203 respondent on review (hereinafter referred to as the taxpayer), is an individual and is a resident of the village of East Aurora, New York; that the said Marjorie K. Campbell filed her Federal income tax return for the taxable year 1933 in the office of the Collector of Internal Revenue for the 28th District of New York, located at Buffalo, New York, which said district is within the jurisdiction of the United States Circuit Court of Appeals for the Second Circuit.

The Commissioner seeks a review of the decision of the United States Board of Tax Appeals by virtue of the provisions of the Revenue Act of 1926, Sections 1001–1005, c. 27, 44 Stat. 9, as amended by the Revenue Act of 1928, Section 603, c. 852, 45 Stat. 873, and further amended by the Revenue Act of 1932, Section 1101, c. 209, 47 Stat. 169 and as further amended by the Revenue Act of 1934, Section 519, c. 277, 48 Stat. 680, and subsequent revenue acts.

II

PRIOR PROCEEDINGS

On February 27, 1936, the Commissioner of Internal Revenue, pursuant to the provisions of Section 272 (a) of the Revenue Act of 1932, as amended by Section 501 of the Revenue Act of 1934 (49 Stat. 755), sent the taxpayer by registered mail a notice of deficiency advising her that the determination of her income tax liability for the taxable year 1933 disclosed a deficiency in tax in the amount of $86,937.47. Thereafter, on May 25, 1936, a petition was filed by the taxpayer with the United States Board of Tax Appeals requesting a redetermination of the deficiency determined in the aforesaid notice of deficiency. On July 24, 1936, the Commissioner filed
204 an answer to the petition, wherein he affirmatively claimed an increased deficiency. On September 3, 1936, the taxpayer filed her reply. On December 12, 1938, the taxpayer filed a motion to file an amended petition and on the same day lodged an amended petition. The motion to amend the petition having been granted, the Commissioner on December 14, 1938, filed his answer to the amended petition.

This proceeding and the cases of Seymour H. Knox, B. T. A. Docket No. 77827, and Dorothy K. G. Rogers, B. T. A. Docket No. 84640, were heard on December 14, 1938, at Washington, D. C. On May 19, 1939, the Board promulgated its opinion (39 B. T. A.—No. 133), and on June 30, 1939, the Board entered its decision ordering and deciding that there is no deficiency in tax for the year 1933.

III

NATURE OF CONTROVERSY

Seymour H. Knox, the father of the taxpayer, died on May 16, 1915. His will provided that the residuary estate should be divided into four parts and that one part, consisting of 20 per cent of the whole, should be placed in trust for this taxpayer. The will provided with respect to the portion placed in trust for this taxpayer that it was so placed for the following uses and purposes:

"To receive, hold and, from time to time, invest and reinvest the same, and to collect the rents, income, issues, and profits on the property from time to time constituting such trust fund and to pay over so much of the net income arising therefrom, as to my said trustees shall seem wise and proper toward the support, maintenance, and education of my daughter, Marjorie Knox, until she shall arrive at the age of twenty-one (21) years, and to accumulate the balance of the income during her minority for her benefit, and to pay over the accumulated income to her when she shall arrive at the age of twenty-one (21) years, and thereafter to pay over the entire net income to my said daughter, Marjorie Knox, until she shall arrive at the age of twenty-eight (28) years, at which time, I give, devise, and bequeath to my said daughter, Marjorie Knox, one-half (½) of the property then constituting said trust fund and I direct my said trustees to pay over the net income on the remaining one-half (½) of said trust fund until she shall arrive at the age of thirty-five (35) years, at which time I give, devise, and bequeath the remaining part of said trust fund to my said daughter, Marjorie Knox, and to her heirs and assigns forever.

"In the event that my said daughter, Marjorie Knox, shall die before the age of thirty-five (35) years, I give, devise, and bequeath any part or portion of said trust fund which has not then been paid over to her, or to the possession of which at the time of her death she was not entitled, unto the issue of said Marjorie Knox, if any, surviving her, to be divided among them, share and share alike. And in case there be no issue her surviving,

then I give, devise, and bequeath said trust fund unto her heirs."

The will further provided that the trustees should have full power to sell, exchange, or dispose of any property in the trust fund, and expressed the wish of the testator that within five years after his death, or as soon thereafter as possible, 50 percent of the value of the trust fund should be invested in securities constituting legal investments for executors or trustees or in unencumbered real property.

206 The trust was formally set up on July 1, 1921, and the executors on that date transferred of record and delivered to the trustees the property as provided in the will. The taxpayer attained the age of twenty-eight years on July 10, 1928, and on that date one-half of the property then constituting the trust fund was transferred of record and delivered by the trustees to her. Certain of the securities which she received at that time were sold during 1933 and certain of the bonds matured and were paid during 1933. Some of the securities sold by her had been held by her father at the time of his death, others had been purchased by the executors, and still others had been purchased by the trustees.

The securities sold in 1933 by the taxpayer included the following:

(1) 840 Shares common stock of U. S. Steel Corporation; 204 Shares common stock of the American Telephone & Telegraph Company; $25,000 face amount 4½% bonds, Federal Land Bank of Louisville, due 1953; $8,000 face amount 4½% bonds Federal Land Bank of Columbia, due 1955.

(2) 104 Shares of common stock of The Atchison, Topeka & Santa Fe Railway Company.

(3) $10,000 face amount Corporate Stock (4% of May 1, 1959) City of New York; 125 Shares common stock of Southern Pacific Company; 320 Shares common stock of Hotels Statler Company, Inc.; 100 Shares common stock of Union Pacific Railroad Company.

207 (4) $50,000 face amount (4% of 1946) bonds of the City of Philadelphia; $10,000 face amount (4¾% of January 1, 1933) bonds of City of Auburn; $20,000 face amount (4½% of January 15, 1933) bonds of City of Rochester.

(5) 500 Shares of common stock of Niagara Hudson Power Corporation; 1,[illegible] Option warrants of Niagara Hudson Power Corporation; 300 Shares of Preferred Stock of Buffalo Niagara & Eastern Power Corporation.

(6) 10,000 Shares of common stock of F. W. Woolworth Company.

The taxpayer contended that in accordance with the third sentence of Section 113 (a) (5) of the Revenue Act of 1932, her basis in every instance for determining gain or loss on the disposition of said property is the fair market value of the securities on the date of delivery to her by the trustees on July 10, 1928.

The Board held that the securities were personal property acquired by the will of her father and not by specific bequest, and that the third sentence of Section 113 (a) (5) of the Revenue Act of 1932 applies and not the general provisions of Section 113 (a) or Section 113 (a) (4), and that the proper basis of the securities in the hands of the taxpayer for gain or loss is their market value of the securities on the date physically delivered to the taxpayer by the trustees on July 10, 1928.

The Commissioner presents that in respect to the securities purchased by the trustees the bases of such securities to
208 the taxpayer were their respective cost to the trustees, as provided by Section 113 (a) of the Revenue Act of 1932; that in respect to the securities purchased by the executors, that the bases to the taxpayer of such securities were their respective cost to the executors, as provided by Section 113 (a) of the Revenue Act of 1932, and in the alternative, if Section 113 (a) (5) of said Act governs, as contended by the taxpayer, then the bases to the taxpayer of such securities were their respective fair market values at the time they were formally transferred from the executors to the trustees on July 1, 1921, and not the time the securities were physically delivered to the taxpayer by the trustees. In respect to the securities owned by the taxpayer's father at the date of his death, the Commissioner presents that the bases to the taxpayer of such securities were the fair market value of such securities at the time of death of taxpayer's father, as provided by Section 113 (a) (4) of the Revenue Act of 1932, and in the alternative, if Section 113 (a) (5) of the Revenue Act of 1932 governs, as contended by the taxpayer, the bases to the taxpayer of such securities were their fair market values at the time of their formal transfer from the executors to the trustees and not the time the securities were physically delivered to the taxpayer by the trustees.

The position of the Commissioner may be summarized in respect to the securities listed above as follows:

1. That Section 113 (a) of the Revenue Act of 1932 is applicable in determining the cost basis of the securities purchased by the executors and trustees, which is cost to them and is applicable to such securities as were thus acquired, as are listed under (1), (4), (5), and (6).

2. That Section 113 (a) (4) of the Revenue Act of 1932 is applicable in determining the cost basis of the securities
209 owned by taxpayer's deceased father and transferred to the trust on July 1, 1921, which cost basis is the fair market value thereof as of May 16, 1915, the date of death of taxpayer's father and is applicable to such securities as were thus acquired, as are listed under (2), (3), and (6).

3. In the alternative, if Section 113 (a) (5) of the Revenue Act of 1932 is applicable, then the "time of distribution to the taxpayer" within the meaning of said Section of said Act is the date the executors distributed the stock and bonds involved to the trustees, which was July 1, 1921, and is applicable to securities listed in (2), (3), (4), (5), and (6).

The taxpayer had 1,000 shares of common stock of the F. W. Woolworth Company which she acquired prior to July 10, 1928, by purchase and by issuance of stock dividends thereon. On July 10, 1928, she received from the trustees 15,000 shares of the same kind of stock already owned, consisting of shares acquired by the trustees by purchase and primarily from the executors of taxpayer's father's estate, which were originally held at the time of decedent's death and increased by stock dividends or exchanges in recapitalizations. In May 1929, she exchanged the aforesaid shares for 40,000 shares of the F. W. Woolworth Company stock in a plan of recapitalization. In December 1933 the taxpayer sold 10,000 shares of said stock for $391,462.25 and in her income tax return for 1933 claimed a capital loss of $278,854.33 thereon.

As the shares sold could not be identified as those purchased at any particular date, she applied the "first in, first out" rule as prescribed by Article 600 (4) of Regulations 77 and regarded her individual purchases as the stock first purchased, using as
a basis of cost the cost of the 1,000 shares purchased by
210 her until it was exhausted, and then she used as a basis for the remaining shares sold the fair market value of the shares of such stock received by her from the trust on July 10, 1928. The Commissioner determined that the first shares purchased were those received from the trustees since, as a matter of fact, they were acquired by the trustees prior to the date upon which the taxpayer purchased her similar shares, and that Section 113 (a) (4) of the Revenue Act of 1932 is applicable in determining the cost of the 10,000 shares of stock sold, and that the basis of said shares is the fair market value on May 16, 1915, the date of death of taxpayer's father, of an equivalent number of shares of such stock as they then existed. In the event that Section 113 (a) (5) of the Revenue

Act of 1932 governs instead of Section 113 (a) (4), then it is presented that the "time of distribution to the taxpayer," as provided therein, of the stock from which the 10,000 shares were derived was July 1, 1921, the date such shares of stock were transferred of record and delivered to the trust by the executors.

The Board held that the trust was a separate taxable entity from the taxpayer and that the former had complete ownership and control of the shares up to the very moment of the distribution to the taxpayer, and that the date of "purchase" of those shares by the taxpayer for the purpose of applying the "first in, first out" rule was July 10, 1928.

The questions presented are:

(1) As to the securities purchased by the trustees with trust funds (subsequent to March 1, 1913), is the basis for determining gain or loss: (a) the cost to the trustees, or (b) the fair market value on the date of delivery by the trustees to the taxpayer?

211 (2) As to the securities purchased by the executors of the taxpayer's father's estate and turned over to the trustees as corpus of the trust, is the basis for determining gain or loss: (a) the cost to the executors, or (b) the fair market value on the date of delivery by the trustees to the taxpayer?

(3) As to the securities owned by the taxpayer's father at the time of his death (or the equivalent number of shares then existing) and turned over to the trustees as corpus of the trust, is the basis for determining gain or loss: (a) the fair market value thereof as of May 16, 1915, the date of death of taxpayer's father, or (b) the fair market value on the date of delivery by the trustees to the taxpayer?

(4) For determining the time of acquisition by the taxpayer in applying the "first in, first out" rule prescribed by Article 600 (4) of Regulations 77, is the time of "acquisition" in respect to the securities originally owned by the taxpayer's father at the time of his death (increased through subsequent distributions in reorganization) or an equivalent number of such shares as then existed and transferred as trust corpus on July 1, 1921, to be computed: (a) from date of death of grantor on May 16, 1915; (b) from the date the securities were formally transferred and delivered to the trust by the executors on July 1, 1921, or (c) the date of delivery by the trustees to the taxpayer on July 10, 1928?

(5) Was the taxpayer's interest "vested" or "contingent" under the laws of New York?

(6) In determining gain or loss under Section 113 (a) (5) of the Revenue Act of 1932, is the meaning of the phrase

212 "the fair market value of the property at the time of the distribution to the taxpayer"—(a) the date when the executors turned over the corpus of the trust to the trustees, or (b) the date of actual delivery by the trustees to the taxpayer?

IV

ASSIGNMENTS OF ERROR

That the Commissioner of Internal Revenue being aggrieved by the opinion and decision of the United States Board of Tax Appeals in these proceedings hereby petitions for a review of said opinion and decision by the United States Circuit Court of Appeals for the Second Circuit, and for the correction of the manifest errors which therein occurred and intervened to his prejudice. The errors committed by the Board, which are relied upon by the Commissioner as the basis of this petition for review, are as follows:

(1) In holding and deciding that personal property delivered by trustees from the trust created by and in accordance with the will of taxpayer's father takes, as its basis for gain or loss in the hands of the taxpayer, its fair market value at the time of the delivery to the taxpayer by the trustees—regardless of whether the property was owned by the father at the date of his death, purchased by the executors, or purchased by the trustees.

(2) In failing to hold and decide, where personal property was owned by taxpayer's father at the date of his death on May 16, 1915, and said property is transferred on July 1, 1921 to a testamentary trust created by and in accordance with the will of taxpayer's father and said property is physically

213 delivered to the said taxpayer by the trustees on July 10, 1928, that the basis of said property for gain or loss in the hands of the taxpayer is the fair market value of such property at the time of the death of taxpayer's father.

(3) In failing to hold and decide, where personal property is purchased or acquired by the executors of taxpayer's father's estate and the said property is transferred on July 1, 1921, to a testamentary trust created by and in accordance with the will of the taxpayer's father and said property is physically delivered to the said taxpayer on July 10, 1928, by the trustees, that the cost basis of said property for gain or loss in the hands of the taxpayer is the same as the cost basis to the executors.

(4) In failing to hold and decide, where personal property is purchased or acquired by testamentary trustees of a trust created by and in accordance with the will of taxpayer's father and said property is physically delivered to said taxpayer on July 10, 1928, by the trustees, that the cost basis of said property

for gain or loss in the hands of the taxpayer is the same as the cost basis to the testamentary trustees.

(5) In holding and deciding that the basis for determining gain or loss of the personal property delivered by trustees from the trust created by and in accordance with the will of taxpayer's father is determined and governed by the third line of Section 113 (a) (5) of the Revenue Act of 1932.

(6) In failing to hold and to decide that the basis for determining gain or loss of the personal property delivered by trustees from the trust created by and in accordance with the will of taxpayer's father is determined and governed by the first sentence of Section 113 (a) of the Revenue Act of 1932,
214 where said property delivered by the trustees was acquired either by the trustees, or the executors before transfer to the testamentary trust.

(7) In failing to hold and to decide that the basis for determining gain or loss of the personal property delivered by trustees from the trust created by and in accordance with the will of taxpayer's father is determined and governed by Section 113 (a) (4) of the Revenue Act of 1932, where said property delivered by the trustees was held by the father at the date of his death on May 16, 1915, and transferred by the executors of the father's estate to the testamentary trustees.

(8) In holding and deciding that the "time of distribution to the taxpayer" within the meaning of Section 113 (a) (5) of the Revenue Act of 1932 is the date the trustees delivered the property as provided in the will to the taxpayer, to wit, July 10, 1928.

(9) In failing to hold and decide that "the time of distribution to the taxpayer" within the meaning of Section 113 (a) (5) of the Revenue Act of 1932 is the date the executors transferred the property as provided in the will to the testamentary trustees for the benefit of the taxpayer, to wit, July 1, 1921.

(10) In failing to hold and decide that the taxpayer realized gains and sustained losses on the disposition of the personal property physically received from the trustees on July 10, 1928, measured by the difference between the sales prices and bases claimed by the Commissioner on the respective properties disposed of in 1933.

(11) In that the decision of the Board is contrary to the position of the Commissioner outlined in General Counsel's Memorandum 14893 (1935), C. B. XIV–1, p. 202.

215 (12) In holding and deciding that the personal property delivered by trustees from the trust on July 10, 1928, created by and in accordance with the will of taxpayer's father, was not "first in" as compared with other like property pur-

chased by the taxpayer individually prior to the delivery to her by the trustees, for the purpose of the first in, first out rule prescribed by Article 600 (4) of Regulations 77.

(13) In holding and deciding that the taxpayer did not acquire any vested interest in the trust property set aside for her benefit under the terms of a will of her father creating to her prior to the date the said property was physically delivered to her by the trustees.

(14) In failing to hold and decide that the taxpayer acquired a vested interest in the trust property set aside for her benefit prior to the date the said property was physically delivered to her by the trustees.

(15) In holding and deciding that the basis for gain or loss on the property physically received from the trust on July 10, 1928, and disposed of together with like property purchased prior to said date, is the fair market value of said property at the time it was delivered by the trustees to the taxpayer, to-wit, July 10, 1928.

(16) In failing to hold and decide, for the purpose of applying the first in, first out rule prescribed by Article 600 (4) of Regulations 77, that the first shares of stock acquired by the taxpayer were those received from the trustees, since they were acquired by the trustees prior to the date upon which the taxpayer had purchased similar shares.

216 (17) In failing to hold and decide that the cost basis of 10,000 shares of stock of F. W. Woolworth Company sold by the taxpayer in 1933 should be determined by taking the fair market value on May 16, 1915, the date of death of taxpayer's father, of an equivalent number of shares of such stock as they then existed, as provided by Section 113 (a) (4) of the Revenue Act of 1932.

(18) In holding and determining that the taxpayer sustained a capital loss of $278,854.33 on the sale of 10,000 shares of stock of F. W. Woolworth Company by first using as a cost basis the cost to taxpayer of 1,000 shares purchased by her and the fair market value of the shares of similar stock received by her from the testamentary trustees on July 10, 1928.

(19) In that its decision is contrary to the principle underlying the action of the United States Supreme Court in the case of McFeely v. Commissioner (1935), 296 U. S. 102.

(20) The Board erred in that its conclusions of law and findings of fact are without substantial evidence to support them.

(21) The Board erred in finding and determining that there is no deficiency in tax liability due from the taxpayer for the year 1933.

(22) The Board erred in failing to find and determine that there is a deficiency in tax liability due from the taxpayer for the year 1933 in the amount of $90,000.00 or such greater amount as is determined to be due upon correction of the errors herein set forth.

217 Wherefore, the Commissioner petitions that said findings of fact and opinion and decision of the United States Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Second Circuit; that a transcript of the record be prepared in accordance with the law and the rules of said court and be transmitted to the Clerk of said court for filing and that appropriate action be taken to the end that the errors herein complained of may be reviewed and corrected by said court.

(Sgd.) SAMUEL O. CLARK, *Jr.*,
Assistant Attorney General.

(Signed) J. P. WENCHEL,
R. L. W.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
CLAUDE R. MARSHALL,
Special Attorney,
Bureau of Internal Revenue.

218 [*Duly sworn to by Claude R. Marshall; jurat omitted in printing.*]

219 In the United States Circuit Court of Appeals For The Second Circuit

B. T. A. Docket No. 84639

[Same title.]

Notice of filing petition for review

Filed Sept. 30, 1939

To: ERNEST J. BROWN, Esq.,
1330 Marine Trust Building,
Buffalo, New York.

You are hereby notified that the Commissioner of Internal Revenue did, on the 22 day of September 1939, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the

Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 22 day of September 1939.

(Signed) J. P. WENCHEL,
R. L. W.

J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

220 Personal service of the avobe and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 26th day of September 1939.

ERNEST J. BROWN,
Attorney for Respondent on Review.

CRM/csl.
9/13/39.

221 In United States Circuit Court of Appeals for the Second Circuit

B. T. A. Docket No. 84639
[Same title.]

Notice of filing petition for review

Filed Sept. 30, 1939

To JOHN L. KENEFICK, Esq.,
1330 Marine Trust Building,
Buffalo, New York.

You are hereby notified that the Commissioner of Internal Revenue did, on the 22 day of September 1939, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 22 day of September 1939.

(Signed) J. P. WENCHEL,
R. L. W.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

222 Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 25th day of September 1939.

(Sgd.) JOHN L. KENEFICK,
Attorney for Respondent on Review.

CRM/csl 9/13/39.

223 In United States Circuit Court of Appeals for the Second Circuit

B. T. A. Docket No. 84639
[Same title.]

Notice of filing petition for review
Filed Sept. 30, 1939

To RALPH M. ANDREWS, Esq.,
1330 Marine Trust Building,
Buffalo, New York.

You are hereby notified that the Commissioner of Internal Revenue did, on the 22 day of September 1939, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 22 day of September 1939.

(Signed) J. P. WENCHEL,
R. L. W.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

224 Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 25th day of September 1939.

RALPH M. ANDREWS,
Attorney for Respondent on Review.

CRM/csl.
9/13/39.

225 In United States Circuit Court of Appeals for the Second Circuit

B. T. A. Docket No. 84639

[Same title.]

Notice of filing petition for review

Filed Sept. 30, 1939

To Mrs. MARJORIE K. CAMPBELL,
East Aurora, New York:

You are hereby notified that the Commissioner of Internal Revenue did, on the 22 day of September 1939, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as field is hereto attached and served upon you.

Dated this 22 day of September 1939.

(Signed) J. P. WENCHEL,
R. L. W.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

226 Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 26th day of September 1939.

MARJORIE K. CAMPBELL,
Respondent on Review.

CRM/csl.
9/13/39.

227 In United States Supreme Court of Appeals for the Second Circuit

B. T. A. Docket No. 84639

[Same title.]

Amended praecipe for record

Filed Oct. 21, 1939

To the CLERK OF THE UNITED STATES BOARD OF TAX APPEALS:

You will please prepare, transmit, and deliver to the Clerk of the United States Circuit Court of Appeals for the Second

Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Second Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of proceedings before the Board.
2. Pleadings before the Board:
(a) Petition, including annexed copy of deficiency letter.
(b) Answer.
(c) Reply.
(d) Amended petition.
(e) Answer to amended petition.
(f) Reply to Answer to Amended Petition.
3. Stipulation of Facts and Exhibit A attached thereto.
4. Respondent's Exhibit A (Decree).
5. Findings of fact and opinion of the Board.

228 6. Decision.

7. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.
8. Orders enlarging time for the preparation of the evidence and for the transmission and delivery of the record.
9. This praecipe (amended).

Said transcript to be prepared, certified, and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Second Circuit.

(Signed) J. P. WENCHEL,
R. L. W.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Receipt of a copy of the above-described amended praecipe for record is acknowledged and agreed to this 19 day of October 1939.

JOHN L. KENEFICK,
Attorney for Respondent on Review.
RALPH M. ANDREWS,
ERNEST J. BROWN,
Attorneys for Respondent on Review.

CRM/csl 10/17/39.

229 [Clerk's certificate to foregoing transcript omitted in printing.]

230 In United States Circuit Court of Appeals for the Second Circuit

Nos. 41–257–258–259—October Term, 1939

(Argued February 15, 1940. Decided June 10, 1940)

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

RICHARD VAN NEST GAMBRILL, RESPONDENT

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

MARJORIE K. CAMPBELL, RESPONDENT

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

SEYMOUR H. KNOX, RESPONDENT

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

DOROTHY K. G. ROGERS, RESPONDENT

231 Petitions by the Commissioner of Internal Revenue to review determinations of the United States Board of Tax Appeals in respect to income taxes of the respondents Gambrill and Knox for the year 1930, and of the respondents Campbell and Rogers for the year 1933. Affirmed.

Before SWAN, AUGUSTUS N. HAND, and PATTERSON, Circuit Judges.

Sewall Key, Acting Assistant Attorney General, J. L. Monarch and Newton K. Fox, Special Assistants to the Attorney General, Counsel for the Commissioner of Internal Revenue in the proceeding against the respondent Gambrill. Samuel O. Clark, Assistant Attorney General, Sewall Key and Arthur A. Armstrong, Special Assistants to the Attorney General, Counsel for the Commissioner of Internal Revenue in the proceedings against the respondents Campbell, Knox, and Rogers. Sidney W. Davidson,

Ben R. Clark, and Allin H. Pierce, Counsel for the respondent Gambrill. James McCormick Mitchell, John L. Kenefick, and Ralph M. Andrews, Counsel for the respondents Campbell, Knox, and Rogers.

232 *Opinion*

AUGUSTUS N. HAND, Circuit Judge:

The foregoing proceedings all involve the correctness of income tax assessments by the Commissioner of Internal Revenue and in each the Commissioner has appealed from decisions of the Board of Tax Appeals modifying his assessments.

In the Gambrill case the Commissioner assessed an income tax deficiency of $11,753.40 for the year 1930, while the Board of Tax Appeals determined that there was an overpayment of $75.60 by the taxpayer. In the Knox case the Commissioner assessed a deficiency for the same year of $35,645.88 while the Board determined that there was a deficiency of $42,842 (arising, however, from adjustments not here in issue). In the Campbell case the Commissioner assessed an income tax deficiency of $86,937.47 for the year 1933, and in the Rogers case a deficiency of $65,549.60 for the same year. The Board found that there was no income tax deficiency on the part of either Campbell or Rogers. We think that its orders in all four proceedings should be affirmed.

In each of the above cases the taxpayer involved was given a remainder interest in a trust created by will. Certain personal securities that were a part of the corpus of the particular trust were delivered by the trustee to the taxpayer after the right to possession became fixed by the termination of the prior beneficial estate. Some of these securities were acquired by the testator during his lifetime, some of them were purchased by the executor after the testator's death before setting up the trust, and some were purchased by the trustee after the trust was established. Securities derived by the trustee in the various ways mentioned were delivered by him to the taxpayer and sold by the latter.

233 In assessing income taxes upon alleged profits realized by the taxpayer the Commissioner used the following bases for computing gains: In the case of securities which had been owned by the decedent, their fair market value at the time when distributed by the executor to the trustee; in the case of securities purchased by the executor or trustee, the cost to such fiduciary; in respect to certain securities purchased by a fiduciary prior to March 1, 1913, as in Gambrill's case, the value on that date, whenever cost was unknown. The Board of Tax Appeals, however, took the view that, because of the provisions of Section 113 (a)

(5) of the Revenue Acts of 1928 and 1932, the proper basis in all cases was the fair market value of the securities at the "time of the distribution to the taxpayer" by the trustee, no matter when or how the trustee or the executor might have derived the particular securities.

In determining how long a taxpayer had held securities for the purpose of computing capital gain or loss under Section 101 of the Revenue Act of 1928 the Board used the dates of delivery of the securities by the trustee to the taxpayer. The Commissioner, on the other hand, used the date of the death of the testator as the beginning of the period of holding securities owned by the latter and the date of purchase by the fiduciary as the beginning in cases where securities were purchased by the executor or trustee.

We agree with the conclusion of the Board that Sections 113 (a) (5) of the Revenue Acts of 1928 and 1932 govern the computation of loss or gain in the cases before us. The pertinent provisions read as follows:

"(a) Property acquired after February 28, 1913.—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * *

234 "(5) Property Transmitted at Death.—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death; * * *"

None of the securities involved in the cases before us were acquired "by specific bequest" or were "acquired by the decedent's estate from the decedent." They were all directly acquired

from testamentary trustees. Accordingly the basis was not "the fair market value of the property at the time of the death of the decedent." Therefore the third clause of Section 113 (a) (5) which embraces "all other cases" of property acquired by will is controlling. That clause provides that: "In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer."

235 The words "the property" in the foregoing sentence seem inevitably to relate to the particular property sold by the taxpayer to whom it was distributed by the trustee. The term "taxpayer" is defined by Section 701 (a) (13) of the Revenue Acts of 1928 and 1932 as "any person subject to a tax imposed by this Act." It is hard to imageine language which would more clearly fix the basis for computing the gain or loss realized upon the sales of the securities with which the Commissioner had to deal than the words "fair market value of the property at the time of the distribution to the taxpayer."

Perhaps the most strenuous objection made by the Commissioner to adopting what seems to be the clear meaning of the statute is that increment in value between the date of the decedent's death and the time of distribution to the taxpayer is not subjected to taxation when the securities are sold and thus tax resources are impaired. But it is frequently true that increments are not subjected to taxation. One common case where increment in value is disregarded is that which occurs during the lifetime of an owner of securities which are not sold by him but are sold after his death by his executors, administrators, trustees, or remaindermen under his will. Such an increment accruing during the lifetime of the owner of securities has never been taken into account in computing gain or loss upon sales after his death. Increment between the date of death of the owner of securities and the date of distribution by an executor to a legatee is also to be disregarded under the third clause of Section 113 (a) (5) in the case of distribution of securities which are transmitted by virtue of a general bequest.

The supposed loss in revenue due to a disregard of fluctuations in the market value of securities between the date of death

236 and the time of distribution is moreover somewhat fanciful, for in all cases where the property depreciates in value between the date of death and the date of distribution a larger tax would result from fixing the basic value at "the time of the distribution to the taxpayer" than from fixing the basis at the time of the testator's death.

The further contention of the Commissioner that the word "taxpayer" as used in the third clause of Section 113 (a) (5)

should be construed as meaning the "trustee" and that the phrase "time of the distribution to the taxpayer" ought to be interpreted as meaning "the date when the executors transferred the property to the trustees," seems to us without warrant. The taxpayers here are undoubtedly the respondents. The trustees are separate entities and as such are neither agents of the respondents nor mere passive fiduciaries. It is true that under certain circumstances they might themselves have become taxpayers in respect to the corpus of their trusts, but only in case they had made sales of some of the securities composing the corpus—not, as here, when without making any sales they wound up their trusts and distributed the corpus to remaindermen. To treat the trustee and beneficiary-remainderman, as the Commissioner wishes us to do, as a "sort of dual tax personality" is to disregard the plain language of the statute and to adopt a concept which seems to us to defy analysis. In view of the clear terms of the third clause of Section 113 (a) (5) it can make no difference whether the interest of any remaindermen be vested, vested subject to be divested, or contingent. In either event the basis should be "the fair market value at the time of the distribution to the taxpayer," i. e., to the respondent whose income taxes are being reviewed, and not to the trustee.

In respect to the securities purchased either by the executors or trustees the Commissioner says they do not come within the third clause of Section 113 (a) (5) because they were not
237 acquired by will. This requires a most technical interpretation of the clause and one that in our opinion is not sound even technically. Any property distributed by a trustee which is part of the corpus of the trust is acquired through and by virtue of the will. Through the will the remaindermen derived all their interests and without it they would have had no standing and would have received nothing. Lyeth v. Hoey, 305 U. S. 188, 194–195.

It is further argued that the Senate Report in respect to the enactment of Section 113 (a) (5) in the 1928 Act justified the Commissioner's interpretation of the statute. In dealing with the third clause the report said: "It would also apply in cases where the executor purchases property and distributes it to the beneficiary." There is, however, no reason because of this mention of purchases by the executor for limiting the application of the report to property so purchased. In cases where a trust has been created by will the executor will often act as trustee before the trust is actually set up and sometimes will sell and purchase securities on behalf of the trust. Indeed the statement in the Senate Report would not cover the particular

facts before us except in situations where the executor so acted.

The Commissioner apparently contends that the decision in Brewster v. Gage, 280 U. S. 327, fixing the date of death as the time when property should be valued under the provisions of the Revenue Act of 1921, for the purposes of computing gain or loss, affords some guide in interpreting Section 113 (a) (5). The difficulty in maintaining such a contention is that Section 113 (a) (5) is specific, that it fixes a different date for valuing acquisitions of property from that of the Act of 1921, and that the opinion in Brewster v. Gage says at page 337: "The deliberate selection of language so differing from that used in the earlier acts indicates that a change of law was intended."

In United States v. Nostrand, 94 F. (2d) 510, and Commissioner v. Libbey, 100 F. (2d) 458, the Court of Appeals
238 of the First Circuit held that the basis for computing gain or loss to the taxpayer was the market value of the property at the time of distribution by the trustee to the remaindermen, and not the value at the time of distribution by the executor to the trustees. These decisions, rather than that of the Seventh Circuit in Commissioner v. Maguire rendered on March 5, 1940, are in accord with our view.

The second question is whether the securities passing to the respondents Gambrill and Knox were held by them for more than two years and hence whether any gain or loss realized by the sale was taxable not as ordinary income or loss but as a capital gain or loss because the securities were "capital assets" as defined in Section 101 (c) (8) and (B) of the Revenue Act of 1928. The Board held that they were not, and they plainly were not unless the period during which they were held by the trustees can be added to the period between the date of distribution to the taxpayers and the date of sale. There cannot be any such tacking because the property, when held by the respective respondents, did not have "for the purpose of determining gain or loss from a sale * * *, the same basis * * * in his hands as it would have in the hands" of the trustees.

On behalf of the Commissioner it is argued that the decision of the Supreme Court in McFeeley v. Commissioner, 296 U. S. 102, requires us to find that the securities had been held from the date of death and that they, therefore, were held for more than two years prior to sale. That decision, however, involved an estate where there was no trust. The court only decided that the general legatee held the securities which were transferred to him by the executor from the date of death. We agree with the Board that the intervening trusts broke the continuity so

that the taxpayer only held the securities from the time they were distributed to him.

239 In the Campbell case certain Woolworth stock was purchased by the taxpayer prior to distribution to her by the trustee of other shares of the same kind. If she did not hold the shares she acquired under the will until they were distributed to her by the trustee, under the "first-in-first-out" rule, her own shares should be treated as sold prior to those which were delivered to her by the trustee. We agree with the Board that her own shares must be regarded as sold first. During the time that the title to the shares remained in the trustee the taxpayer had no control over their disposition and they were not acquired until she obtained them as her own. Helvering v. San Joaquin Fruit & Investment Co., 297 U. S. 496.

The orders of the Board of Tax Appeals are affirmed.

The orders of the Board of Tax Appeals are affirmed.

240 In United States Circuit Court of Appeals, Second Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

MARJORIE K. CAMPBELL, RESPONDENT

Appeal from the United States Board of Tax Appeals

Judgment

(Filed June 29, 1940)

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

D. E. ROBERTS, *Clerk.*

241 [File endorsement amitted.]

242 [Clerk's certificate to foregoing transcript omitted in printing.]

243 Supreme Court of the United States

Order allowing certiorari

(Filed November 12, 1940)

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1941

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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 474

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

SEYMOUR H. KNOX

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 28, 1940
CERTIORARI GRANTED NOVEMBER 12, 1940

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SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Proceedings before United States Board of Tax Appeals	1	1
Docket entries	1	1
Petition	4	3
Exhibit A—Notice of deficiency dated August 15, 1934, from Office of Commissioner of Internal Revenue to Mr. Seymour H. Knox	8	5
Answer	18	10
Amended answer	20	11
Reply	25	13
Amendment to amended answer	30	16
Amended reply	32	17
Stipulation of facts	37	20
Exhibit A—Last will and testament of Seymour H. Knox dated May 12, 1915	42	23
Respondent's Exhibit A—Decree dated May 24, 1921—Surrogates Court of Erie County	67	39
Memorandum opinion, Murdock, M.,	81	47
Decision	86	50
Petition for review and assignments of error	87	51

	Original	Print
Notices of filing petition for review	100	59
Amended praecipe for record	108	62
Certificate of clerk [omitted in printing]	110	63
Proceedings in U. S. C. C. A., Second Circuit	111	63
Opinion, Hand, J.,	113	64
Judgment	121	69
Clerk's certificate [omitted in printing]	123	70
Order allowing certiorari	124	70

1 Before United States Board of Tax Appeals

Docket No. 77827

SEYMOUR H. KNOX, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket entries

Appearences: For Taxpayer—Ralph M. Andrews, Esq.; Dwight Taylor, Esq.; John L. Kenefick, Esq.; Ernest J. Brown, Esq. For Comm'r—B. M. Brodsky, Esq.; W. H. Schwatka, Esq.; E. L. Updike, Esq.

1934

Nov. 12—Petition received and filed. Taxpayer notified. (Fee paid.)
Nov. 12—Copy of petition served on General Counsel.

1935

Jan. 9—Answer filed by General Counsel.
Jan. 12—Copy of answer served on taxpayer.

2 1937

July 20—Motion for leave to file amended answer, amended answer lodged, filed by General Counsel.
July 20—Motion for circuit hearing at Buffalo, N. Y., filed by General Counsel.
July 22—Hearing set August 18, 1937, on motion.
July 24—Motion for leave to file amended answer granted.
Aug. 18—Hearing had before Mr. Mellott on motion of respondent to consolidate dockets 61658, 62811, 63186, 63245, 51, 64523, 64908, 10 to 15, 24, 65011, 24, 65202, 65393, 71815, 16, 77824, 27 & 28, 84639, 40, 41 & 42, and to deny his own motion for circuit hearing—granted. Motion filed at hearing.
Aug. 26—Hearing set November 1, 1937.
Sept. 1—Reply to amended answer filed by taxpayer. 9/3/37 copy served.
Sept. 4—Notice of the appearance of Dwight Taylor as counsel for taxpayer filed.

Sept. 4—Motion for continuance until after 1/1/38 filed by taxpayer. 9/7/37 granted to Spring of 1938.

Dec. 14—Notice issued placing proceeding on Washington, D. C., Calendar.

1938

Oct. 7—Hearing set Dec. 5, 1938.

Nov. 28—Motion for a continuance to Dec. 14, 1938, or on a date early in the month of January 1939, filed by taxpayer. 11/30/38 granted and continued to 12/14/38.

Dec. 14—Hearing had before Mr. Murdock on merits. Submitted. On motion of respondent to file amended answer—granted. Motion of petitioner to file amended reply—granted. Motion and amendment to amended answer filed. Motion and amended reply filed. Stipulation of facts filed. Appearance of John L. Kenefick, Ernest J. Brown filed.

Dec. 28—Transcript of hearing of Dec. 14, 1938, filed.

3 1939

Jan. 12—Brief filed by taxpayer. 1/12/39 copy served.

Jan. 26—Motion to correct brief filed on Jan. 12, 1939, filed by taxpayer. 1/28/39 granted.

Feb. 10—Brief filed by General Counsel.

Feb. 27—Reply brief filed by taxpayer. 3/11/39 copy served.

Mar. 21—Stipulation to correct the transcript filed.

May 19—Memorandum opinion rendered, John E. Murdock, Div. 3. Decision will be entered in accordance with the notice of deficiency.

May 22—Decision entered, J. E. Murdock, Div. 3.

May 27—Motion to vacate decision and modify opinion so as to provide for recomputation under Rule 50 filed by General Counsel. 6/1/39 granted.

Jun. 13—Computation of deficiency filed by General Counsel.

Jun. 15—Hearing set July 5, 1939, on settlement.

Jun. 23—Consent to settlement filed by taxpayer.

Jun. 30—Decision entered, J. E. Murdock, Div. 3.

Sept. 22—Petition for review by U. S. Circuit Court of Appeals (2) with assignments of error filed by General Counsel.

Sept. 30—Proof of service filed by General Counsel. 4—3 Attorneys and 1 for taxpayer.

Oct. 10—Praecipe for record filed by General Counsel.

Oct. 20—Proofs of service of filing praecipe filed by General Counsel.

Oct. 21—Agreed amended praecipe for record filed by General Counsel. Proof of service thereon.

4 Before United States Board of Tax Appeals

Docket No. 77827

[Same title.]

Petition

Filed November 12, 1934

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency dated August 15, 1934 (IT:AR:A-2 MEW-90D), and as a basis of his proceeding alleges as follows:

1. At all the times herinafter mentioned petitioner was and still is a resident of the City of Buffalo, County of Erie and State of New York.

2. The notice of deficiency, a copy of which is attached hereto marked "Exhibit A," was mailed to the petitioner on August 15, 1934.

3. The tax in controversy is an income tax for the calendar year 1930, and amounts to the sum of $35,645.83.

4. The determination of tax set forth in said deficiency letter is based upon the error that if the United States Board of Tax Appeals decides in favor of respondent petitioner's appeal now pending before it (Docket No. 65203), involving petitioner's income tax liability for the year 1929, respondent has erroneously included in petitioner's net income for the year 1930 an amount of $60,475.75, upon the ground that said amount
5 represented a profit realized by petitioner on the dissolution in the year 1930 of Marine Equities Corporation.

5. The facts upon which petitioner relies as the basis of this proceeding are as follows:

(a) On or about the 18th and 19th days of September 1929, petitioner purchased on a "when, as and if" basis, 2,000 shares of the capital stock of Marine Midland Corporation. Thereafter and on or about the 18th day of October 1929, there were issued to petitioner on account of said purchase, stock certificates representing said shares, for which on said date petitioner paid $166,025.00.

(b) On or about the 16th day of October 1929, petitioner purchased 10,000 additional shares of the common capital stock

of said Marine Midland Corporation at $60.00 per share, or a total price of $600,000.00.

(c) On November 18, 1929, petitioner duly subscribed for 11,550 shares of the capital stock of Marine Equities Corporation, a New York corporation with its principal office and place of business in the City of Buffalo, New York, and paid therefor $35.275 per share, or a total subscription price of $407,426.25.

(d) On November 19, 1929, petitioner duly sold to said Marine Equities Corporation 1,550 shares of the Marine Midland Corporation stock which he had theretofore purchased on the 18th and 19th days of September 1929, and the 10,000 shares of said stock which he had purchased on the 16th day of October 1929, for which petitioner received from said Marine Equities Corporation $407,137.50.

6 (e) On or about the 17th day of May 1930, said Marine Equities Corporation was duly dissolved, and on or about the same date petitioner received on the liquidation of said corporation, in consideration of the surrender of his stock therein, 11,490 shares of the capital stock of Marine Midland Corporation and $2,557.00 in cash. On the date said Marine Midland Corporation stock was received by petitioner it had a fair market value of $40.50 per share, or an aggregate value of $465,345.00, or an aggregate amount received on said liquidation of stock and cash of $467,902.00.

(f) The respondent, in his deficiency letter (a copy of which is attached hereto and designated Exhibit A), has included in petitioner's net income an amount of $60,475.75 upon the ground that the petitioner derived a profit of that amount on the liquidation of said Marine Equities Corporation.

6. Wherefore, petitioner prays that this Board may hear the proceeding and determine that if the Board decides petitioner's appeal now pending before it (Docket No. 65203), involving petitioner's income tax liability for the year 1929, in favor of the respondent, respondent has erroneously determined that petitioner derived a profit of $60,475.75 on the liquidation of Marine Equities Corporation.

(S) RALPH M. ANDREWS,
Counsel for Petitioner,
Office and Post Office Address, 1330 Marine Trust Building,
239 Main Street, Buffalo, New York.

7 [*Duly sworn to by Seymour H. Knox; jurat omitted in printing.*]

8 *Exhibit A annexed to petition*

SN-A.

TREASURY DEPARTMENT,
Washington, Aug. 15, 1934.

Office of Commissioner of Internal Revenue. Address Reply to Commissioner of Internal Revenue and Refer to—

Mr. SEYMOUR H. KNOX,
2100 Rand Building, Buffalo, New York.

SIR: You are advised that the determination of your income tax liability for the year(s) 1930, discloses a deficiency of $35,645.83 as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1928, as amended by section 501 of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Com-
9 missioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully.

GUY T. HELVERING,
Commissioner.

By (Signed) CHAS. T. RUSSELL,
Deputy Commissioner.

Enclosures:
Statement.
Form 870.

STATEMENT

IT:AR:A-2.
MEW-90D.

In re: Mr. Seymour H. Knox, 2100 Rand Building, Buffalo, New York

Income Tax Liability year 1930; income tax liability $40,656.51; income tax assessed $5,010.68; deficiency $35,645.83.

10 The deficiency shown herein is based upon the report dated December 14, 1932, prepared by Revenue Agent H. E. Murray, and transmitted to you under date of December 30, 1932, and upon such adjustments as are shown below.

Subsequent to the issuance of office letter dated April 11, 1934, in which you were advised of the adjustments proposed and the proposed disallowance of your claim for refund, a protest was received and a conference was held in this office on June 26, 1934. At the conference you were represented by Mr. Ralph M. Andrews and Mr. Charles A. Harmon, Buffalo, New York.

The issues involved were:

First. Profit on sale of Marine Union Investors' stock.

Second. Profit on liquidation of Marine Equities, Incorporated, in 1930.

In regard to issue one, the revenue agent disallowed the loss of $309,248.06, claimed and computed a profit of $68,407.94 upon the sale of 21,940 shares of Marine Union Investors stock. In arriving at the profit, the examining officer based his action upon the actual identification of stock certificates representing stock exchanged and used an average cost of $22.00 per share for the stock sold.

Discussion of this issue in conference develops that, included in the 21,940 shares sold, were 8,575 shares of Marine Share Corporation, which were assigned to you on September 1, 1928. It is held that per share value to be allotted to the stock is $55.25, or the fair market value on the date assigned.

This is in accordance with the decision of the United States Board of Tax Appeals in the case of Ralph W. Harbi-
11 son, reported in 26, Board of Tax Appeals, page 896, wherein it was held that the basis for determining gain or loss on the sale of personal property acquired by will, upon the termination of a trust, is the fair market value of the property at the time of distribution; the time of distribution being held in your case to be September 1, 1928, when you became thirty years of age, and when, by the terms of your father's will, you were to receive one-half of the balance of a trust fund set up for your benefit under the will.

Relative to issue two, you are advised that information on file in this office discloses that in 1929 you claimed a loss on the sale of 11,550 shares of Marine Midland Corporation stock, which was disallowed for the reason that control of the stock remained with you through the immediate purchase of 11,550 shares of Marine Equities, Incorporated; the Marine Equities having been organized by you and other stockholders in 1929. The examining officer based his action of the disallowance of the loss on the

grounds that no loss or gain resulted from the transaction under the provisions of section 112 (b) (5) of the Revenue Act of 1928.

In 1930, the Midland Equities, Incorporated, liquidated and you received 11,490 shares of Marine Midland stock at a market value of $465,345.00 and cash of $2,557.00, or a value of $467,902.00; the cost of these shares being $409,426.25, resulted in a profit of $60,475.75 upon the liquidation.

It is noted that the United States Board of Tax Appeals ruled in the case of James E. Wells, 29 Board of Tax Appeals #43, a stockholder in the Marine Midland Corporation, that the taxpayer sustained a deductible loss in 1929 upon the transaction; however, in view of the fact that the Commissioner of Internal Revenue has rendered a nonacquiescence in this decision as
12 reported in Internal Revenue Bulletin, volume XIII, #3, published January 15, 1934, the previous action of the Bureau in including the gain of $60,475.75 as taxable income for 1930 is sustained.

A synopsis of your adjusted income tax liability follows:

Income shown on the return exclusive of capital net gain		$64,529.25
Add:		
1. Interest increased		303.00
2. Loss on sales decreased		178,536.03
3. Dividends increased		2,379.50
4. Salary disallowed		600.00
5. Interest disallowed		582.34
		$246,930.12
Less:		
6. Fiduciary income	$941.96	
7. Contributions increased	2,872.99	
		3,814.95
Income subject to surtax		$243,115.17
Less:		
Dividends	$628,513.05	
Liberty bond interest	383.69	
Personal exemption and credit for dependents	4,300.00	
		633,196.74
Income for normal tax		None
Surtax on $243,115.17		$40,283.03
Tax at 12½ percent on capital net gain of $4,287.41		535.92
Total tax		$40,818.95
13 Less:		
Earned income credit limited to 25 percent of surtax on $26,650.04	$156.38	
Tax paid at source	6.06	162.44
Total tax assessable		$40,656.51
Tax previously assessed		5,010.68
Additional tax to be assessed		$35,645.83

Explanation of Changes

1. Interest on tax-free covenant bonds received from the estate of Seymour H. Knox in the amount of $303.00 has been transferred from fiduciary income to the proper block on the return.

2. Loss on sale of stocks is decreased by $178,536.03 as follows:

Loss on sale of 21,940 shares of Marine Union stock disallowed		$88,293.98
Loss on disposition of 16,600 shares of Marine Union stock disallowed		97,295.70
		$185,589.68
Less:		
Loss on various stocks through "Blue-Jay" accounts resulted in a loss of	$4,023.25	
whereas there was reported a profit of	3,030.40	7,053.65
Net increase in income		$178,536.03

14 The loss sustained upon the disposition of 21,940 shares of Marine Union Investors stock is computed as follows:

Marine Share Corporation

2/28/29—940 shares @ $32.00		$30,080.00
2/28/30—3,000 shares @ $32.00		70,575.00
3,940 shares		$100,655.00
8/4/27—43 rights purchased	$344.00	
9/1/27—340 shares acquired through above rights	6,800.00	
340 shares value	$7,144.00	
9/1/28—8,575 shares assigned to taxpayer at a value of $55.25 per share	$473,768.75	
8/30/28—85 shares purchased	2,550.00	
9,000 shares value	$483,462.75	
9,000 shares exchanged 2 for 1 in Marine Union Investors, Incorporated, or—		
18,000 shares value		$483,462.75
3,940 shares cost		100,655.00
21,940 shares total		$584,117.75
Brought forward		584,117.75
21,940 shares sold		367,406.94
Loss		216,710.81
15 340 shares value $7,144.00 now 680 shares value $7,144.00 held more than 2 years sold for 680/21,940 of $367,406.94 or selling price	$11,387.00	
Cost	7,144.00	
Capital net gain	$4,243.27	
Total loss shown above		$216,710.81
Increased by capital net gain transferred to Schedule D		4,243.27
Total ordinary loss		$220,954.08

Loss shown on return	309,248.06
Loss disallowed	$88,293.98
Loss claimed on the disposition of 16,600 shares of this stock is disallowed by this same adjustment	$97,295.70

3. Dividends were increased as follows:

Unreported dividends received through the Blue-Jay account	$257.50
Unreported dividend from the Statler Hotels	160.00
Unreported dividend from Marine Midland	3,552.00
	$3,969.50

16 Less:

Extra dividend paid December 31, 1929 on United States Steel stock	$1,142.00	
Decrease in dividends through Seymour H. Knox Trust	448.00	1,590.00
Net increase		$2,379.50

4. The amou't of $600.00 paid as salary to accountant is disallowed since it also claimed and allowed on line 18 as other deductions.

5. Interest payments were overstated by $582.34.

6. Fiduciary income is decreased by $941.96 as follows:

Amount transferred to tax-free covenant bond block of the return (item 2 above)	$303.00
Overstatement of distributable income from Seymour H. Knox Trust	638.96
Total	$941.96

7. Due to the increase in income the entire amount of $14,203.00 claimed for contributions can now be allowed as a deduction, or an increase of $2,872.99.

Reference is made to your claim for refund in the amount of $5,010.68 income taxes for the taxable year 1930.

The claim is based upon the statement that if the sale of Marine Midland Corporation stock for Midland Equities is
17 treated as a nontaxable reorganization in 1929, the loss upon the liquidation of Midland Equities, Incorporated, in 1930 was understated.

The exchange feature in the year 1929 is still pending in this office and the Commissioner of Internal Revenue has rendered a nonacquiescence (Internal Revenue Bulletin, Volume XIII, #3), in the similar case of James E. Wells, 29 B. T. A. #43.

For the foregoing reason your claim will be disallowed. Official notice of the disallowance of your claim will be issued by registered mail in accordance with section 1103 (a) of the Revenue Act of 1932.

Copies of this letter have been mailed to your representatives, Mr. Ralph M. Andrews, 1330 Marine Trust Building, Buffalo, New York, and Mr. Charles A. Harmon, 422 M. and T. Building, Buffalo, New York, in accordance with the authority conferred upon them in the powers of attorney executed by you and on file with the Bureau.

18 Before United States Board of Tax Appeals

Docket Number 77827

[Same title.]

Answer

Filed Jan. 9, 1935

The Commissioner of Internal Revenue, by his attorney, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, for answer to the petition filed by the above-named petitioner, admits and denies as follows:

1. Admits the allegations contained in Paragraph 1.
2. Admits the allegations contained in Paragraph 2.
3. Admits the allegations contained in Paragraph 3.
4. Denies each and every allegation of error set forth in Paragraph 4 of the petition.
5. Denies the allegations set forth in Paragraphs 5 (a), 5 (b), 5 (c), 5 (d), 5 (e), and 5 (f) of the petition.
6. Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified or denied.

19 Wherefore it is prayed that the taxpayer's appeal be denied.

(Signed) ROBERT H. JACKSON,
Robert H. Jackson,
Assistant General Counsel for the Bureau of Internal Revenue.

Of Counsel:
S. L. YOUNG,
Special Attorney,
Bureau of Internal Revenue.

sly-k 1-8-34.

20 Before United States Board of Tax Appeals

(Stamp—United States Board of Tax Appeals—Lodged—July 20, 1937.)

Docket No. 77827

[Same title.]

Amended answer

Filed July 24, 1937

Comes now the Commissioner of Internal Revenue, by his attorney, Morrison Shafroth, Chief Counsel, Bureau of Internal Revenue, and for amended answer to the petition filed in the above-entitled proceeding, admits, denies, avers, and alleges as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits that the tax in controversy is income tax for the calendar year 1930, but denies that the amount in controversy is as alleged in paragraph 3 of the petition.

4, 5, and 6. Avers that since the Board, by opinion promulgated January 24, 1936, and decision entered March 10, 1936, has decided petitioner's appeal (Docket No. 65203) for the year 1929 against the respondent and in favor of the petitioner,

21 the averments and allegations contained in paragraphs 4, 5, and 6 are now wholly immaterial and insufficient to show that the Commissioner erred in any way in determining the deficiency asserted in the notice of deficiency. For further answer to said averments and allegations, the respondent denies the same.

7. Avers that in determining the deficiency set out in the notice of deficiency, the Commissioner erred in favor of the petitioner by allowing as a deduction $186,575.08 as an ordinary loss on the sale of 17,150 shares of capital stock of Marine Union Investors, Inc., instead of finding that petitioner had realized a capital gain of $79,293.58 on the sale of 10,320 of such shares and including the same in income, and finding that petitioner had realized an ordinary loss of $13,687.41 on the sale of 6,830 of such shares and limiting the deduction to such amount.

8. The respondent relies on the following facts in support of the above averment:

(a) In the years 1927 and 1928 petitioner was the sole beneficiary of a trust created under and pursuant to the will of his father.

(b) On August 31, 1927, the trustees of said trust purchased for cash 5,160 shares of capital stock of Marine Share Corporation at $20.00 per share or for a total purchase price of $103,200.00. Thereafter, on July 20, 1928, said corporation issued to its stockholders rights to acquire additional shares of its capital stock, which rights were exercised by the trustees of the aforesaid trust on August 30, 1937. At the times of the issuance and exercise of such rights the market value of the shares of capital stock of Marine Share Corporation (ex-rights) was $50.75 per share
22 or 90.625% of the total value of the share and the right.

At the same times the market value of the rights was $5.25 per right, or 9.375% of the total value of the shares and the rights. Of the original cost of the 5,160 shares of Marine Share Corporation stock, 9.375 or $9,675.00 is allocable to such rights, leaving an adjusted cost to the trust for the 5,160 shares of $93,525.00.

(c) On or about September 1, 1928, said 5,160 shares of Marine Share Corporation stock was transferred from such trust to petitioner. The basis to petitioner of said 5,160 shares of Marine Share Corporation stock was the same as the adjusted cost thereof to the trustees of the aforesaid trust, viz, $93,575.00. Thereafter, said 5,160 shares of capital stock of Marine Shares Corporation were in a nontaxable reorganization exchanged by the petitioner for 10,320 shares of Marine Union Investors, Inc. The basis to the petitioner of the 10,320 shares of stock of the Marine Union Investors, Inc., was the same as the basis to petitioner of the 5,160 shares of capital stock of Marine Share Corporation, viz, $93,525.00. On June 10, 1930, petitioner sold said 10,320 shares of Marine Union Investors, Inc., for a total selling price of $172,818.58. Petitioner realized a profit on the sale of said shares of $79,293.58, which profit is taxable as a capital gain.

(d) On August 30, 1928, the trustees of the aforesaid trust, through the exercise of rights, including the rights received on the 5,160 shares mentioned above, obtained 3,415 shares of capital stock of Marine Share Corporation at a cash expenditure of $102,450.00. The portion of the cost to the trust of the shares on which such rights were received allocable to such rights was 3,415 multiplied by $20.00 multiplied by .09375, or $25,612.50.

The adjusted cost to the trust of said 3,415 shares of capital
23 stock of Marine Share Corporation was $128,062.50, viz, $102,450.00 plus $25,612.50.

(e) On or about September 1, 1928, said 3,415 shares of capital stock of Marine Share Corporation were transferred by the trustees of the aforesaid trust to the petitioner. The basis to petitioner of said 3,415 shares of stock was the same as the adjusted cost thereof to the trustees of the aforesaid trust, viz, $128,-

062.50. Thereafter the petitioner in a nontaxable reorganization exchanged 3,415 shares of capital stock of Marine Share Corporation for 6,830 shares of capital stock of Marine Union Investors, Inc. The basis to petitioner of said 6,830 shares of capital stock of Marine Union Investors, Inc. was the same as the basis to petitioner of the 3,415 shares of capital stock of Marine Share Corporation, viz, $128,062.50. On June 10, 1930, petitioner sold the 6,830 shares of capital stock of Marine Union Investors Corporation for $114,375.09. The petitioner sustained an ordinary loss on the sale of said shares of $13,687.41.

(f) In determining the deficiency the Commissioner treated $473,768.75 as the selling price of the two blocks aggregating 17,150 shares of capital stock of the Marine Union Investors, Inc., used $287,193.67 as the basis to petitioner of said 17,150 shares of stock, and allowed as a deduction $186,575.08 as an ordinary loss sustained on the sale of said stock.

Wherefore, it is prayed that the Board redetermine the correct amount of the deficiency involved in this proceeding to be equal to the amount determined by the Commissioner, viz, $35,645.83 plus any and all additional amounts which may result
24 from the correction of any error made by the Commissioner. The Commissioner hereby makes claim for the increased deficiency resulting from such redetermination.

(Signed) MORRISON SHAFROTH,
Morrison Shafroth,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
F. R. SHEARER,
E. L. UPDIKE,
Special Attorneys,
Bureau of Internal Revenue.

elu/bs 7/15/37.

25 Before United States Board of Tax Appeals

Docket No. 77827

[Same title.]

Reply

The petitioner by his attorney, John L. Kenefick, in reply to respondent's amended answer herein, admits and denies the affirmative allegations of said amended answer as follows:

4, 5, and 6. Admits that by opinion promulgated January 24, 1936, and decision entered March 10, 1936, the Board has decided

petitioner's appeal (Docket No. 65203) for the year 1929 against the respondent and in favor of the petitioner. Denies each and every other allegation contained in paragraphs 4, 5, and 6 of respondent's amended answer.

7. Admits that the Commissioner of Internal Revenue has allowed petitioner a deduction of $186,575.08 as an ordinary loss on the sale of 17,150 shares of the capital stock of Marine Union Investors, Inc., and that he did not determine that petitioner had realized a capital gain of $79,293.58 on the sale of 10,320 of such shares and an ordinary loss of $13,687.41 on the sale of 6,830 of such shares. Denies that the Commissioner of Internal Revenue erred in so determining. Denies each and every other allegation contained in paragraph 7 of respondent's amended answer.

8 (a). Admits the allegations contained in paragraph 8 (a) of respondent's amended answer.

8 (b) Denies each and every allegation contained in paragraph 8 (b) of respondent's amended answer, and alleges the facts
26 in this regard to be that on September 1, 1927, the Trustees of said trust for the petitioner purchased 13,660 shares of the capital stock of Marine Share Corporation, paying therefor in cash at $20 per share, an aggregate purchase price of $273,200. Thereafter and on July 20, 1928, said Marine Share Corporation issued rights to the holders of its common stock of record July 20, 1928, entitling said stockholders to acquire on or before September 30, 1928, at $30 per share, one new share of the common stock of said corporation for each four shares held. That on or about said July 20, 1928, said Trustees received in respect of their holdings of 13,660 shares of Marine Share Corporation stock rights entitling them to acquire 3,415 additional shares of said common stock. On said July 20, 1928, the date said rights were issued, the stock of Marine Share Corporation (ex rights) had a fair market value of $50.75 per share, or 90.625% of the total value of the shares and rights, and the rights had a fair market value of $5.25 per right, or 9.375% of the total value of the shares and rights. The portion of the cost to the Trustees of the shares as to which the rights entitling the Trustees to acquire 3,415 additional shares were issued, was 9.375% of $273,200, or $25,612.50. The portion of the cost to the Trustees allocable to the shares as to which said rights were issued was $247,587.50.

8 (c). Denies that on or about September 1, 1928, said 5,160 shares of Marine Share Corporation stock were transferred from said trust to the petitioner, and alleges the facts in this regard to be that, in accordance with the terms of the will creating said

trust for petitioner, the latter became entitled to receive on September 1, 1928, and thereafter and on October 8, 1928, did receive from the trustees of said trust 5,160 shares of the trustees' original acquisition of 13,660 shares of the capital stock of Marine Share Corporation, said stock on that date having a fair
27 market value of $55.25 per share, or an aggregate fair market value of $285,090.00. Admits that thereafter said 5,160 shares of the capital stock of Marine Share Corporation were in a non-taxable transaction exchanged by the petitioner for 10,320 shares of the capital stock of Marine Union Investors, Inc. Admits that on June 10, 1930, petitioner sold said 10,320 shares of the capital stock of Marine Union Investors, Inc., for $172,818.58. Denies each and every other allegation contained in paragraph 8 (c) of respondent's amended answer.

8 (d). Admits that on August 30, 1928, the Trustees of said trust for petitioner exercised all of the rights received in respect of their original acquisition of 13,660 shares of the capital stock of Marine Share Corporation and acquired 3,415 additional shares of the common stock of said corporation, paying therefor $102,450 in cash. Admits that the portion of the cost to the Trustees of the shares on which such rights were received allocable to such rights was $25,612.50. Admits that the adjusted cost to the Trustees of said 3,415 shares of the capital stock of Marine Share Corporation was $102,450, plus $25,612.50, or $128,062.50, but denies that the same is in any respect material in this proceeding. Denies each and every other allegation contained in paragraph 8 (d) of respondent's amended answer.

8 (e). Denies that on or about September 1, 1928, said 3,415 shares of the capital stock of Marine Share Corporation were transferred by the Trustees of the aforesaid trust to petitioner, and alleges the facts in this regard to be that in accordance with the terms of the will creating said trust petitioner became entitled on September 1, 1928, to receive and thereafter and on October 8, 1928, did receive from the Trustees of the trust said 3,415 shares of the capital stock of Marine Share Corporation. Admits that
28 thereafter the petitioner in a nontaxable reorganization exchanged said 3,415 shares of the capital stock of Marine Share Corporation for 6,830 shares of the capital stock of Marine Union Investors, Inc. Admits that on June 10, 1930, petitioner sold said 6,830 shares of the capital stock of Marine Union Investors, Inc., for $114,375.09. Denies each and every other allegation contained in paragraph 8 (e) of respondent's amended answer.

8 (f). Upon information and belief, denies that in determining the deficiency against petitioner the Commissioner treated $473,-

768.75 as the selling price of the two blocks aggregating 17,150 shares of the capital stock of Marine Union Investors, Inc., and alleges that the Commissioner correctly used $287,193.67 as said selling price. Upon information and belief, denies that the Commissioner used $287,193.67 as the basis to petitioner of said 17,150 shares of stock, and alleges that the Commissioner correctly used $473,768.75 as said basis. Admits that the Commissioner allowed a deduction of $186,575.08 as an ordinary loss sustained on the sale of said stock. Denies each and every other allegation contained in paragraph 8 (f) of respondent's amended answer.

Wherefore, the petitioner prays that the Board may hear the proceeding and determine that there is no greater deficiency in petitioner's income tax liability than that determined by the respondent in his final determination.

JOHN L. KENEFICK,
Counsel for Petitioner,
Office and Post Office Address, 1330 Marine Trust Building,
239 Main Street, Buffalo, New York.

29 [*Duly sworn to by Seymour H. Knox; jurat omited in printing.*]

30 Before United States Board of Tax Appeals

Docket No. 77827

[Same title.]

Amendment to amended answer

Filed at Hearing December 14, 1938

Comes now the Commission of Internal Revenue by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for amendment to the amended answer heretofore filed in the above-entitled proceeding avers and alleges as follows:

9. Avers that in determining the deficiency set out in the notice of deficiency the Commissioner erred in favor of the petitioner by failing to include in petitioner's 1930 income a taxable dividend of $35,982.00 received by the petitioner from Marine Midland Corporation.

10. The respondent relies on the following facts in support of the above averment:

(a) On November 6, 1929, Marine Midland Corporation declared a dividend on its common stock equal to thirty cents per share, payable December 31, 1929, to stockholders of record as of the close of business on December 2, 1929.

(b) Petitioner thereafter as the record holder of 119,940 of said shares of said stock at the close of business on December 2, 1929, received in respect thereof $35,982.00 of said dividend.

31 (c) In determining the deficiency set out in the notice of deficiency no part of said deficiency was included in income by the Commissioner.

(d) The amount used by the Commissioner in his notice of deficiency as petitioner's income from dividends of domestic corporations should be increased by said amount of $35,982.00.

Wherefore it is prayed that the Board redetermine the correct amount of the deficiency involved in this proceeding to be equal to the amount determined by the Commissioner, viz., $35,645.83, plus any and all additional amounts which may result from the correction of any error made by the Commissioner. The Commissioner hereby makes claim for the increased deficiency resulting from such redetermination.

(Signed) J. P. WENCHEL,
K.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
W. HERMAN SCHWATKA,
EDWARD L. UPDIKE,
Special Attorneys,
Bureau of Internal Revenue.
ELU-afh 12-12-38.

32 Before United States Board of Tax Appeals

Docket No. 77827

[Same title.]

Amended reply

Filed at Hearing Dec. 14, 1938

The petitioner by his attorney, Ralph M. Andrews, in reply to respondent's amended answer and respondent's amendment to his amended answer herein, admits and denies the affirmative allegations of said amended answer and said amendment to said amended answer, as follows:

4, 5, and 6. Admits that by opinion promulgated January 24, 1936, and decision entered March 10, 1936, the Board has decided petitioner's appeal (Docket No. 65203) for the year 1929 against the respondent and in favor of the petitioner. Denies each and every other allegation contained in paragraphs 4, 5, and 6 of respondent's amended answer.

7. Admits that the Commissioner of Internal Revenue has allowed petitioner a deduction of $186,575.08 as an ordinary loss on the sale of 17,150 shares of the capital stock of Marine Union Investors, Inc., and that he did not determine that petitioner had realized a capital gain of $79,293.58 on the sale of 10,320 of such shares and an ordinary loss of $13,687.41 on the sale of 6,830 of such shares. Denies that the Commissioner of Internal Revenue erred in so determining. Denies each and every other allegation contained in paragraph 7 of respondent's amended answer.

33 8 (a) Admits that in the years 1927 and 1928 petitioner was the sole beneficiary then entitled to receive income and, upon his thirtieth birthday on September 1, 1928, a part of the principal of a trust created under and pursuant to the will of his father.

8 (b) Denies each and every allegation contained in paragraph 8 (b) of respondent's amended answer, and alleges the facts in this regard to be that on September 1, 1927, the Trustees of said trust for the petitioner purchased 13,660 shares of the capital stock of Marine Share Corporation, paying therefor in cash at $20 per share, an aggregate purchase price of $273,200. Thereafter and on July 20, 1928, said Marine Share Corporation issued rights to the holders of its common stock of record July 20, 1928, entitling said stockholders to acquire on or before September 30, 1928, at $30 per share, one new share of the common stock of said corporation for each four shares held. That on or about said July 20, 1928, said Trustees received in respect of their holdings of 13,660 shares of Marine Share Corporation stock rights entitling them to acquire 3,415 additional shares of said common stock. On said July 20, 1928, the date said rights were issued, the stock of Marine Share Corporation (ex rights) had a fair market value of $50.75 per share, or 90.625% of the total value of the shares and rights, and the rights had a fair market value of $5.25 per right, or 9.375% of the total value of the shares and rights. The portion of the cost to the Trustees of the shares as to which the rights entitling the Trustees to acquire 3,415 additional shares were issued, was 9.375% of $273,200, or $25,612.50. The portion of the cost to the Trustees allocable to the shares as to which said rights were issued was $247,587.50.

34 8 (c) Admits that on or about September 1, 1928, said 5,160 shares of Marine Share Corporation stock were transferred from said trust to the petitioner, and alleges the facts in this regard to be that, in accordance with the terms of the will creating said trust for petitioner, the latter became entitled to receive on September 1, 1928, and on that date, did

receive from the Trustees of said trust 5,160 shares of the Trustees' original acquisition of 13,660 shares of the capital stock of Marine Share Corporation, said stock on that date having a fair market value of $55.25 per share, or an aggregate fair market value of $285,090.00. Admits that thereafter said 5,160 shares of the capital stock of Marine Share Corporation were in a nontaxable transaction exchanged by the petitioner for 10,320 shares of the capital stock of Marine Union Investors, Inc. Admits that on June 10, 1930, petitioner sold said 10,320 shares of the capital stock of Marine Union Investors, Inc., for $172,818.58. Denies each and every other allegation contained in paragraph 8 (c) of respondent's amended answer.

8 (d) Admits that on August 30, 1928, the Trustees of said trust for petitioner exercised all of the rights received in respect of their original acquisition of 13,660 shares of the capital stock of Marine Share Corporation and acquired 3,415 additional shares of the common stock of said corporation, paying therefor $102,450 in cash. Admits that the portion of the cost to the Trustees of the shares on which such rights were received allocable to such rights was $25,612.50. Admits that the adjusted cost to the Trustees of said 3,415 shares of the capital stock of Marine Share Corporation was $102,450, plus $25,612.50, or $128,062.50, but denies that the same is in any respect material in this proceeding. Denies each and every other allegation contained in paragraph 8 (d) of respondent's amended answer.

35 8 (e). Admits that on or about September 1, 1928, said 3,415 shares of the capital stock of Marine Share Corporation were transferred by the Trustee of the aforesaid trust to petitioner, and alleges the facts in this regard to be that in accordance with the terms of the will creating said trust petitioner became entitled on September 1, 1928, to receive and on that date did receive from the Trustees of the trust said 3,415 shares of the capital stock of Marine Share Corporation. Admits that thereafter the petitioner in a non-taxable reorganization exchanged said 3,415 shares of the capital stock of Marine Share Corporation for 6,830 shares of the capital stock of Marine Union Investors, Inc. Admits that on June 10, 1930, petitioner sold said 6,830 shares of the capital stock of Marine Union Investors, Inc., for $114,375.09. Denies each and every other allegation contained in paragraph 8 (e) of respondent's amended answer.

8 (f). Upon information and belief, denies that in determining the deficiency against petitioner the Commissioner treated $473,-968.75 as the selling price of the two blocks aggregating 17,150 shares of the capital stock of Marine Union Investors, Inc., and

alleges that the Commissioner correctly used $287,193.67 as said selling price. Upon information and belief, denies that the Commissioner used $287,193.67 as the basis to petitioner of said 17,150 shares of stock, and alleges that the Commissioner correctly used $473,768.75 as said basis. Admits that the Commissioner allowed a deduction of $186,575.08 as an ordinary loss sustained on the sale of said stock. Denies each and every other allegation contained in paragraph 8 (f) of respondent's amended answer.

36 9. Admits that in determining the deficiency set out in the notice of deficiency the Commissioner failed to include in petitioner's 1930 income a taxable dividend of $35,982.00 received by the petitioner from Marine Midland Corporation.

10 (a). Admits the allegations contained in paragraph 10 (a) of respondent's amendment to his amended answer.

10 (b). Admits the allegations contained in paragraph 10 (b) of respondent's amendment to his amended answer.

10 (c). Admits that in determining the deficiency set out in the notice of deficiency no part of said dividend was included in income by the Commissioner.

10 (d). Admits the allegations contained in paragraph 10 (d) of respondent's amendment to his amended answer.

Denies generally and specifically each and every affirmative allegation contained in respondent's amended answer and his amendment to said amended answer not hereinbefore specifically admitted, qualified, or denied.

Wherefore, the petitioner prays that the Board may hear the proceeding and determine that there is no greater deficiency in petitioner's income tax liability than that determined by the respondent in his final determination, increased solely and only by an increase in petitioner's income from dividends of domestic corporations in the amount of $35,982.00.

RALPH M. ANDREWS,
Counsel for Petitioner,
Office and Post Office Address, 1330 Marine Trust Building,
239 Main Street, Buffalo, New York.

37 Before United States Board of Tax Appeals

Docket No. 77827

[Same title.]

Stipulation of facts

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the following facts

shall be taken as true for the purpose of these proceedings and in the determination of the above appeal, provided, however, that this stipulation shall be without prejudice to the right of either party hereto to introduce other and further evidence at the hearing hereof not inconsistent with the facts herein stipulated to be true.

1. Seymour H. Knox, the petitioner herein, is and at all times material herein was a resident of the City of Buffalo, New York.

I

2. Petitioner derived an ordinary gain of $60,475.75 on the dissolution and liquidation of Marine Equities Corporation on May 17, 1930. Petitioner properly reported said gain in his income tax return for the calendar year 1930 and the Commissioner of Internal Revenue has properly retained said gain in petitioner's gross income in his final determination (Exhibit A of the petition herein).

II

3. Petitioner's father, Seymour H. Knox, died on May 16, 1915 leaving a Last Will and Testament, a true and cor-
38 rect copy of which is annexed hereto, designated Exhibit A and hereby made part hereof.

4. On August 31, 1927, the trustees of the trust, created under Subdivision (C) of Article Twenty-first of petitioner's father's will (Exhibit A), purchased 13,660 shares of the capital stock of Marine Share Corporation, a New York corporation, paying therefor in cash at $20.00 per share an aggregate of $273,200.00. Thereafter, on July 20, 1928, said Marine Share Corporation issued to the holders of its common stock of record on July 20, 1928 rights entitling said stockholders to obtain on or before August 31, 1928 at $30.00 per share, one new share of the common stock of said corporation for each four shares held. Accordingly, immediately after July 20, 1928, said trustees received in respect of their holdings of 13,660 shares of the capital stock of Marine Share Corporation a subscription warrant entitling them to obtain 3,415 additional shares of said common stock. On July 20, 1928, the date on which said rights were issued, Marine Share Corporation stock (ex-rights) had a fair market value of $50.75 per share or 90.625 per cent of the total value of the shares and rights, and the rights had a fair market value of $5.25 per right (four rights being necessary to acquire one new share) or 9.375 per cent of the total value of the shares and rights.

5. On August 30, 1928 the trustees of said trust for petitioner exercised all of the rights received in respect of said 13,660 shares of the capital stock of Marine Share Corporation and obtained 3,415 additional shares of the common stock of said corporation paying therefor $102,450.00 in cash. On August 30, 1928, the date on which said rights were exercised, Marine Share Corporation stock (ex-rights) had a fair market value of $53.50 per share or 90.105 per cent of the total value of the shares and rights, and the rights had a fair market value of $5.875 per right or 9.895 per cent of the total value of the shares and rights.

6. Petitioner attained the age of thirty years on September 1, 1928. Thereupon on that date said trustees, pursuant to "Article twenty-first (C)" of the will of petitioner's father, transferred of record and delivered to petitioner certain securities and property including certificates representing 5,160 shares of the trustees' original purchase of 13,660 shares of the capital stock of Marine Share Corporation and all of the 3,415 shares of the capital stock of said corporation obtained on August 30, 1928, by the trustees on the exercise of rights.

7. On September 1, 1928, shares of the capital stock of Marine Share Corporation had a fair market value of $55.25 per share.

8. Thereafter and on or about March 1, 1929, petitioner exchanged said 8,575 shares of the capital stock of Marine Share Corporation received by petitioner as stated in paragraph 6 hereof for 17,150 shares of the capital stock of Marine Union Investors, Inc. Said exchange was nontaxable under Section 112 (b) (3) of the Revenue Act of 1928.

9. Thereafter on June 10, 1930, petitioner sold said 17,150 shares of the capital stock of Marine Union Investors, Inc., for $287,193.67.

10. In his notice of deficiency (Exhibit A of the petition in this proceeding) the Commissioner held (a) that the basis to the petitioner for tax purposes of said 17,150 shares of Marine Union Investors, Inc., was $473,768.75, to wit, the fair market value on September 1, 1928, of the 8,575 shares of the capital stock of Marine Share Corporation; (b) that the selling price of said 17,150 shares of Marine Union Investors, Inc., stock was $287,193.67, and (c) allowed $186,575.08 as a deduction as an ordinary loss sustained on the sale of said stock.

11. The executors of the last will and testament of petitioner's father, Seymour H. Knox, deceased, and the trustees of the trust created under "Article Twenty-first (C)" of petitioner's father's will, complied with the provisions of said will and the require-

ments of the laws of the State of New York with respect to distributions of income including accumulated income.

12. Said executors, said trustees, and the petitioner at all times kept their respective books of account and filed their respective tax returns on a cash receipts and disbursements basis.

III

13. On November 6, 1929, Marine Midland Corporation declared a dividend on its common stock equal to 30 cents per share, payable December 31, 1929, to stockholders of record as of the close of business on December 2, 1929. Petitioner thereafter, as the record holder of 119,940 of said shares of said stock at the close of business on December 2, 1929, received in respect thereof $35,982.00 of said dividend. It is stipulated and agreed by the parties hereto that petitioner's income from dividends of
41 domestic corporations during the calendar year 1930 should be increased by said amount of $35,982.00.

RALPH M. ANDREWS,
Counsel for Petitioner.

Signed J. P. WENCHEL,
Y.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

42 *Exhibit A annexed to stipulation of facts*

LAST WILL AND TESTAMENT OF SEYMOUR H. KNOX

DATED MAY 12TH, 1915

LAST WILL AND TESTAMENT OF SEYMOUR H. KNOX

I, Seymour H. Knox, of the City of Buffalo, County of Erie, and State of New York, being of sound mind and memory, do hereby make, publish, and declare this my last Will and Testament, in manner following, that is to say:

ARTICLE FIRST. I direct my executors hereinafter named to pay all my lawful debts and funeral expenses. I direct my executors hereinafter named to pay from the funds in my estate any transfer tax or taxes, or any collateral inheritance, succession or legacy tax or taxes imposed by law at the time of my death, upon any and all property, or interest therein, passing under and by virtue of the terms of this my last Will and Testament, and

I will and direct that all gifts, bequests, and devises herein mentioned shall be paid at the net amount herein stated without any deduction on account of any such tax or taxes.

43 ARTICLE SECOND. I hereby authorize and direct my executors hereinafter named to cause to be erected in Forest Lawn Cemetery, in the City of Buffalo, N. Y., a suitable monument or mausoleum at an expense of not exceeding Fifty thousand dollars ($50,000) therefor, to be paid from the funds of my estate.

ARTICLE THIRD. I give and devise unto my wife, Grace M. Knox, the house, stable, land and premises and their appurtenances, situate on the easterly side of Delaware Avenue between Utica and Ferry Streets in the City of Buffalo, and now occupied by my wife and myself as a residence; to have and to hold the same unto my said wife, Grace M. Knox, and to her heirs and assigns forever.

I also give and bequeath unto my said wife, Grace M. Knox, all the pictures, furniture, rugs, books, ornaments, tableware, plate, silver, linen, and all other household furniture, and equipment, all jewelry and clothing, and also all horses, carriages, automobiles and stable and automobile equipment owned by me at the time of my death (excepting only trotting-bred horses, sulkies, harnesses, and other equipment hereinafter mentioned and referred to in Article Eighth hereof).

ARTICLE FOURTH. I also give and bequeath unto my wife, Grace M. Knox, the sum of Two hundred fifty thousand dollars ($250,000) and I will and direct that said legacy be paid to my said wife in securities owned by me at the time of my death to be selected by her and taken by her at their appraised value.

ARTICLE FIFTH. I give and bequeath to my brother, Burtis L. Knox now residing at Chaffee, Erie County, N. Y., fifty

44 (50) shares of the common capital stock of F. W. Woolworth Company, a corporation organized under the laws of the State of New York; and in addition thereto, I give and bequeath to my said brother, Burtis L. Knox, an annuity of Twelve hundred dollars ($1,200) and direct my executors hereinafter named to pay over said annuity to my said brother in quarterly payments of Three hundred dollars ($300) each during his natural life. I direct my said executors to set aside the sum of Thirty thousand dollars ($30,000) for the purpose of producing said annuity and at the death of my said brother, I give, devise and bequeath the property so set aside to produce said annuity unto my son, Seymour H. Knox, if he be then living; if not, to my daughters, Dorothy Knox and Marjorie Knox, to be divided between them, share and share alike.

Notwithstanding the foregoing provisions, I further will and direct that if on the 1st day of January, in the year Nineteen hundred and thirty-three, my said brother, Burtis L. Knox, shall be then living, that the annual payments to him shall then cease, and in that event I give, devise, and bequeath to said Burtis L. Knox, all of the property and estate then held to produce such income for his benefit, pursuant to the provisions of this Article Fifth of my last Will and Testament.

ARTICLE SIXTH. I give and bequeath to my brother, Henry D. Knox, of the City of Buffalo, three hundred (300) shares of the common capital stock of F. W. Woolworth Company. I make no other provision for the benefit of my said brother, Henry D. Knox, for the reason that I have during my lifetime, made other provision for his benefit.

ARTICLE SEVENTH. I give and bequeath unto Catherine Avery, cousin of my wife, who now resides at Los Angeles,
45 California, One hundred (100) shares of the common capital stock of said F. W. Woolworth Company.

ARTICLE EIGHTH. I give and bequeath unto Benjamin F. White of East Aurora, five (5) of the trotting-bred horses owned by me at the time of my death; said horses to be selected by said Benjamin F. White. I also give and bequeath to said Benjamin F. White necessary harnesses for said horses so selected by him and two sulkies; said harnesses and sulkies to be selected by him from the harnesses and sulkies owned by me at the time of my death, and that the remaining trotting-bred horses, sulkies, and harnesses be sold as hereinafter provided.

ARTICLE NINTH. I give and bequeath to the Home for the Friendless, located in the City of Buffalo, N. Y., One hundred (100) shares of the common capital stock of said F. W. Woolworth Company; and to the Charity Organization of Buffalo, one hundred (100) shares of the common capital stock of said F. W. Woolworth Company.

ARTICLE TENTH. I give and bequeath unto the Buffalo Fine Arts Academy, Five hundred (500) shares of the common capital stock of said F. W. Woolworth Company.

ARTICLE ELEVENTH. I give and bequeath to the Methodist Episcopal Church located at Russell, St. Lawrence County, N. Y., Fifty (50) shares of the common capital stock of said F. W. Woolworth Company, in trust nevertheless, for the following purposes: the said shares of stock so bequeathed to be held or sold and the proceeds invested and, from time to time, re-invested, and the net income thereon used to assist in defraying the curent expenses of said church.

46 ARTICLE TWELFTH. I give and bequeath unto William T. Damon, now in my employ, the full amount due or to

become due to me upon a certain mortgage made by him to me and covering property situate on the shore of Lake Erie and in the Province of Ontario, Canada, and I direct my executors to cancel and discharge said mortgage.

ARTICLE THIRTEENTH. I give and bequeath unto Bankers Trust Company of Buffalo, a corporation organized under the laws of the State of New York, and doing business in the City of Buffalo, N. Y., and to Walter P. Cooke of the City of Buffalo, N. Y., Two thousand (2,000) shares of the common capital stock of said F. W. Woolworth Company, in trust nevertheless, for the following uses and purposes, to wit:

To receive, hold and, from time to time, in their discretion, to sell the same or portions thereof, and to invest and reinvest the same, or the proceeds thereof, and to collect the rents, income, issues, and profits on the property from time to time constituting such trust fund, and to pay over the net income arising therefrom in quarterly payments, to my sister, Carrie E. Fowler, during her natural life, and at the death of my said sister, Carrie E. Fowler, I give, devise, and bequeath the property then constituting such trust fund unto such person or persons and in such proportions as shall have been in that behalf appointed in and by the terms of the last Will and Testament duly executed of my said sister, Carrie E. Fowler, and in the event that my said sister, Carrie E. Fowler, shall fail to exercise such power of appointment, then at the death of my said sister, I give, devise, and bequeath the property constituting such trust fund unto her sons, Seymour K. Fowler and Raymond P. Fowler, share and share alike. In case of the prior death of either of said sons,
47 the issue of said deceased son to take the share to which the parent would have been entitled if living. And in case of the prior death of both Seymour K. Fowler and Raymond P. Fowler leaving no issue them surviving, I give, devise, and bequeath the property constituting said trust fund to my heirs.

Notwithstanding the foregoing provision, I further will and direct that in event that my said sister, Carrie E. Fowler, is living on the 1st day of January, in the year Nineteen hundred and thirty-three, the trust hereby created for her benefit shall then terminate, and I give, devise, and bequeath to my said sister, Carrie E. Fowler, in that event, all of the property then constituting said trust fund.

ARTICLE FOURTEENTH. I give and bequeath unto my nephew, Seymour K. Fowler, son of my sister, Carrie E. Fowler, Three Hunderd (300) shares of the common capital stock of said F. W. Woolworth Company.

ARTICLE FIFTEENTH. I give and bequeath unto said Bankers Trust Company of Buffalo, a corporation organized under the

laws of the State of New York, and Walter P. Cooke of the City of Buffalo, N. Y., Three hundred (300) shares of the common capital stock of said F. W. Woolworth Company, in trust nevertheless, for the following uses and purposes, to wit:

To receive, hold, and from time to time, in their discretion, to sell the same or portions thereof and to invest and reinvest the same or the proceeds thereof, and to collect the rents, income, issues and profits on the property from time to time constituting such trust fund and to pay over the net income arising therefrom, semi-annually, unto my nephew, Raymond P. Fowler, son of my sister, Carrie E. Fowler, until he shall arrive at the age of
48 twenty-five (25) years, at which time I give and bequeath one-half of said trust fund to my nephew, Raymond P. Fowler, and direct my said trustees to pay over one-half of such trust fund to him and thereafter to pay to my said nephew, Raymond P. Fowler, the net income arising from the balance of said trust fund until he shall arrive at the age of thirty (30) years, at which time, I give, devise, and bequeath the balance of said trust fund to my said nephew, Raymond P. Fowler, and direct my said trustees to transfer and convey said property then constituting said trust fund to him. In case of the death of said Raymond P. Fowler before he shall arrive at the age of thirty (30) years, I give, devise, and bequeath whatever property may remain in said trust fund unto his children, if any, to be divided among them, share and share alike, and if he shall leave no children then living, I give, devise, and bequeath the balance of said trust fund to his brother, Seymour K. Fowler, if he then be living; if not, I give, devise, and bequeath the balance of said trust fund to my heirs.

ARTICLE SIXTEENTH. I give and bequeath unto Bankers Trust Company of Buffalo, a corporation organized under the laws of the State of New York, doing business in Buffalo, N. Y., and Walter P. Cooke of the City of Buffalo, N. Y., Two hundred fifty (250) shares of the common capital stock of said F. W. Woolworth Company, in trust nevertheless, for the following uses and purposes, to wit:

To receive, hold, and from time to time, in their discretion to sell the same or portions thereof and to invest and reinvest the same or the proceeds thereof, and to collect the rents, issues, income, and profits on the property from time to time constituting such trust fund and to pay over the net income arising
49 therefrom semiannually unto my niece, Verona Knox, daughter of my brother, Burtis L. Knox, until she shall arrive at the age of thirty (30) years, at which time I give, devise, and bequeath the property constituting said trust fund to

my said niece, Verona Knox. In case of the death of my said niece, Verona Knox, before arriving at the age of thirty (30) years, I give, devise, and bequeath the property then constituting said trust fund unto her children, if any then living, share and share alike. If she shall have no children then living, I give, devise, and bequeath said trust fund unto her sister, Ethel Knox, if she be then living; if not, then to my heirs.

ARTICLE SEVENTEENTH. I give and bequeath unto the Bankers Trust Company of Buffalo, a corporation organized under the laws of the State of New York, and doing business at Buffalo, N. Y., and Walter P. Cooke of the City of Buffalo, N. Y., Two hundred fifty (250) shares of the common capital stock of said F. W. Woolworth Company, in trust nevertheless, for the following uses and purposes, to wit:

To receive, hold, and, from time to time, in their discretion, to sell the same or portions therof and to invest and reinvest the same or the proceeds thereof, and to collect the rents, income, issues, and profits on the property, from time to time, constituting such trust fund and to pay over the net income arising therefrom semi-annually unto my niece, Ethel Knox, daughter of my brother, Burtis L. Knox, until she shall arrive at the age of thirty (30) years, at which time I give, devise, and bequeath the property constituting said trust fund to my said niece, Ethel Knox. In case of the death of my said niece, Ethel Knox, before arriving at the age of thirty (30) years, I give, devise, and bequeath the property constituting said trust fund unto her children, if any, share and share alike. If she shall have no children then living, I give, devise, and bequeath said trust fund unto her sister, Verona Knox, if she be then living; if not, then to my heirs.

ARTICLE EIGHTEENTH. I give and bequeath unto each of the children of my brother, Henry D. Knox, who may be living at the time of my death One hundred (100) shares of the common capital stock of said F. W. Woolworth Company.

ARTICLE NINETEENTH. I give and bequeath unto each household servant employed in or about my homes at Buffalo and East Aurora, including chauffeurs and stable employees, who have been in my employ at the time of my death for upwards of one (1) year, the sum of One hundred dollars ($100) to each such servant for each and every year of such continuous employment prior to the date of my death, and I will and direct that the determination of my executors as to who is entitled to receive the legacy under this Article of my last Will and Testament and the period of employment of each such person, and the amount of the legacy hereunder which

each is to receive, shall be final and conclusive and binding upon all parties.

ARTICLE TWENTIETH. I give and devise unto my son, Seymour H. Knox, the real property constituting my farm and summer home located at East Aurora, N. Y., together with the residence and all barns and other buildings and structures situated thereon and all stable and farming equipment used or purchased for use in connection with the same.

ARTICLE TWENTY-FIRST. In determining the amount of my residuary estate for the purpose of making distribution
51 thereof as hereinafter provided, I direct that there be first set aside the following property, to wit:

All the shares of the capital stock owned by me at the time of my death in the following corporations: The Marine National Bank of Buffalo, a banking corporation having its principal place of business in the City of Buffalo, N. Y.; Bankers Trust Company of Buffalo, a corporation organized under the laws of the State of New York, having its principal place of business in the City of Buffalo, N. Y.; The Central National Bank of Buffalo, a banking corporation having its principal place of business in the City of Buffalo, N. Y.; Bankers Trust Company, a corporation organized under the laws of the State of New York, having its principal place of business in the City of New York, N. Y.; Irving National Bank, a corporation having its principal place of business in the City of New York, N. Y.; The Chase National Bank, a corporation having its principal place of business in the City of New York, N. Y.; which capital stock I have by subdivision (C) of this Article numbered "Twenty-first" of this my last Will and Testament, given and bequeathed to my brother, Henry D. Knox and Walter P. Cooke, in trust, for the benefit of my son, Seymour H. Knox.

All the rest, residue and remainder of my property and estate, real, personal, and mixed, of every name, nature, and description, and wher'sover situate, but not including, however, the shares of the capital stock of the six corporations mentioned in the first paragraph of this Article Twenty-first of my last Will and Testament, I give, devise, and bequeath as follows:

(A) Forty (40) per cent thereof (not including, however, the shares of the capital stock of the six corporations
52 mentioned in the first paragraph of this Article Twenty-first), I give, devise, and bequeath unto my brother, Henry D. Knox, and Walter P. Cooke, both of the City of Buffalo, N. Y., in trust nevertheless, for the following uses and purposes, to wit:

To receive, hold, and from time to time, invest and reinvest the same, and to collect the rents, income, issues, and profits on

the property from time to time constituting such trust fund and to pay over the net income arising therefrom quarterly unto my wife, Grace M. Knox, for and during the term of her natural life. At the death of my said wife, I give, devise, and bequeath one-half (½) of the property then constituting said trust fund unto such person or persons, corporation or corporations, and in such proportions as shall have been in that behalf appointed in the last Will and Testament, duly executed, of my said wife, Grace M. Knox; the remaining one-half (½) of the property constituting said trust fund, and in case my said wife shall have failed to exercise the power of appointment in reference to one-half (½) of said trust fund above mentioned, the entire property then constituting said trust fund, I will and direct shall be divided into three (3) equal parts or portions; one part or portion to be held by my said trustees for the benefit of my daughter, Dorothy Knox, and the net income thereon paid over to her semi-annually, until she shall arrive at the age of thirty (30) years, at which time I give, devise, and bequeath said part or portion to my said daughter, Dorothy Knox; one part or portion to be held by my said trustees for the benefit of my son, Seymour H. Knox, and the net income thereon paid over to him semiannually, until he shall arrive at the age of thirty (30) years, at which time I give, devise, and bequeath said part or portion to
53 my said son, Seymour H. Knox; one part or portion to be held by my said trustees for the benefit of my daughter, Marjorie Knox, and the net income thereon paid over to her, semiannually, until she shall arrive at the age of thirty (30) years, at which time I give, devise, and bequeath said part or portion to my said daughter, Marjorie Knox. In case of the death of either or any of my said children before reaching the age of thirty (30) years, I give, devise, and bequeath the trust fund so held for the benefit of either or any of my said children, unto the issue of such deceased child or children, share and share alike, and in case either or any of my said children shall die before reaching the age of thirty (30) years leaving no issue surviving, then I give, devise, and bequeath the property constituting said trust fund so held for the benefit of such deceased child or children unto my children who may then be living, to be divided between them share and share alike.

In the event that at the time of the death of my said wife Grace M. Knox, any or all of my children shall be less than twenty-one (21) years of age, I direct that only so much of the income payable to such child or children, shall be used for the support and education of such child or children as my trustees shall deem wise and proper and that the remainder of said income shall be accumulated during the minority of such

child or children and paid over when each such child arrives at the age of twenty-one (21) years.

(B) Twenty (20) per cent. of all the rest, residue, and remainder of my said estate (not including, however, the shares of the capital stock of the six corporations mentioned in the first paragraph of this Article Twenty-first) I give, devise and bequeath to my brother Henry D. Knox and Walter P. Cooke, both of the City of Buffalo, in trust nevertheless, for the following uses and purposes, to wit:

54 To receive, hold and, from time to time, invest and reinvest the same, and to collect the rents, income, issues and profits on the property from time to time constituting such trust fund and to pay over so much of the net income arising therefrom, as to my trustees shall seem wise and proper toward the support, maintenance and education of my daughter, Dorothy Knox, until she shall arrive at the age of twenty-one (21) years, and to accumulate the balance of the income during her minority for her benefit, and to pay over such accumulated income to her when she shall arrive at the age of twenty-one (21) years, and thereafter to pay over the entire net income to my said daughter Dorothy Knox, until she shall arrive at the age of twenty-eight (28) years, at which time I give, devise, and bequeath to my said daughter, Dorothy Knox, one-half (½) of the property then constituting said trust fund and I direct my said executors to pay over to my daughter, Dorothy Knox, the net income on the remaining one-half (½) of said trust fund until she shall arrive at the age of thirty-five (35) years, at which time I give, devise and bequeath the remaining part of said trust fund to my said daughter, Dorothy Knox, and to her heirs and assigns forever.

In the event that my said daughter, Dorothy Knox, shall die before reaching the age of thirty-five (35) years, I give, devise, and bequeath any part or portion of said trust fund, which has not then been paid over to her, or to the possession of which at the time of her death she was not entitled, unto the issue of said Dorothy Knox, if any, surviving her, to be divided among them, share and share alike. In case there be no issue her surviving, then I give, devise and bequeath said trust fund unto her heirs.

(C) Twenty (20) per cent. of said rest, residue and remainder of my property and estate, I give, devise and bequeath

55 unto my brother, Henry D. Knox and Walter P. Cooke, both of the City of Buffalo, N. Y., together with all of the capital stock owned by me at the time of my death in the following corporations, to wit: The Marine National Bank of Buffalo, a banking corporation having its principal place of business in the City of Buffalo, N. Y.; Bankers Trust Company of Buffalo, a

corporation organized under the laws of the State of New York, having its principal place of business in the City of Buffalo, N. Y.; The Central National Bank of Buffalo, a banking corporation having its principal place of business at Buffalo, N. Y.; Bankers Trust Company, a corporation organized under the laws of the State of New York, having its principal place of business in the City of New York, N. Y.; Irving National Bank, a corporation having its principal place of business in the City of New York, N. Y.; and The Chase National Bank, a corporation having its principal place of business in the City of New York, N. Y., in trust nevertheless, for the following uses and purposes to wit:

To receive, hold and, from time to time, invest and reinvest the same, and to collect the rents, income, issues, and profits on the property from time to time constituting said trust fund and to pay over so much of the net income thereon as to my said trustees shall seem wise and proper toward the support, maintenance and education of my son, Seymour H. Knox, until he shall arrive at the age of twenty-one (21) years, and to accumulate the balance of the income during his minority for his benefit, and to pay over such accumulated income to him when he shall arrive at the age of twenty-one (21) years, and thereafter to pay over the entire net income on said trust fund until he shall arrive at the age of twenty-five (25) years, at which time, I give, 56 devise, and bequeath to my said son, Seymour H. Knox, a portion of said trust fund, to wit, Five hundred thousand dollars ($500,000), and direct my executors to pay over said sum of Five hundred thousand dollars ($500,000) to my said son, Seymour H. Knox, and thereafter to pay over the net income on the trust fund remaining in their hands to my said son until he shall arrive at the age of thirty (30) years, at which time I give, devise and bequeath one-half (½) of the trust fund then remaining in the hands of my said trustees to my said son, Seymour H. Knox, and I direct my said trustees to transfer and convey the same to him and thereafter to pay over the net income arising on the trust fund remaining in their hands to my said son, Seymour H. Knox, until he shall arrive at the age of thirty-five (35) years, at which time I give, devise, and bequeath the balance of said trust fund unto my said son, Seymour H. Knox. In case of the death of my said son, Seymour H. Knox, prior to the time when he shall arrive at the age of thirty-five (35) years, I give, devise, and bequeath all of said trust fund which may not then have been paid over to him, or to the possession of which he may not at the time of his death have been entitled, unto his issue, if any, him surviving, to be divided among them, share and share alike. And in the event that there be no issue him surviving, I give,

devise, and bequeath the balance of said trust fund unto his heirs.

(D) Twenty (20) per cent. of all the rest, residue and remainder of my said estate (not including, however, the shares of capital stock of the six corporations mentioned in the first paragraph of this Article Twenty-first) I give, devise, and bequeath to my brother, Henry D. Knox and Walter P. Cooke, both of the City of Buffalo, in trust nevertheless, for the following uses and purposes, to wit:

57 To receive, hold and, from time to time, invest and reinvest the same, and to collect the rents, income, issues and profits on the property from time to time constituting such trust fund and to pay over so much of the net income arising therefrom, as to my said trustees shall seem wise and proper toward the support, maintenance and education of my daughter, Marjorie Knox, until she shall arrive at the age of twenty-one (21) years, and to accumulate the balance of the income during her minority for her benefit, and to pay over the accumulated income to her when she shall arrive at the age of twenty-one (21) years, and thereafter to pay over the entire net income to my said daughter, Marjorie Knox, until she shall arrive at the age of twenty-eight (28) years, at which time, I give, devise and bequeath to my said daughter, Marjorie Knox, one-half (½) of the property then constituting said trust fund and I direct my said trustees to pay over the net income on the remaining one-half (½) of said trust fund until she shall arrive at the age of thirty-five (35) years, at which time I give, devise and bequeath the remaining part of said trust fund to my said daughter, Marjorie Knox, and to her heirs and assigns forever.

In the event that my said daughter, Marjorie Knox, shall die before reaching the age of thirty-five (35) years, I give, devise and bequeath any part or portion of said trust fund, which has not then been paid over to her, or to the possession of which at the time of her death she was not entitled, unto the issue of said Marjorie Knox, if any, surviving her, to be divided among them, share and share alike. And in case there be no issue her surviving, then I give, devise and bequeath said trust fund unto her heirs.

ARTICLE TWENTY-SECOND. I hereby grant unto the trustees of the various trusts created by this my last Will and Testa-
58 ment, with the same force and effect as though these provisions were repeated separately in respect to each of said trusts, full power and authority to invest and, from time to time, reinvest all of the property and funds coming into the hands of my various trustees, in such property, stock, bonds and other securities as to the trustees of each said trust shall seem wise

and proper, whether or not such investments shall be those which, under the laws of the State of New York, an executor and trustee is permitted to make, and without regard to limitations or restrictions, hereby giving and granting unto such trustees, full power and authority to receive from my executors and to retain as a part of the trust funds in their hands any and all stocks, bonds or other securities, which may form a part of my estate at the time of my death, and which they shall receive from the executors thereof in the course of the distribution of my said estate, hereby granting unto my said trustees full power and authority to exchange any stocks, bonds or other securities belonging to any trust for any stocks, bonds or other property upon any consolidation, merger or re-organization of any of the companies whose stocks or securities are so held by me at the time of my death, or which may form a part of any such trust fund at any time thereafter, and I hereby give and grant unto my said trustees full power and authority to sell, lease, convey or dispose of any and all property, real, personal or mixed, which may at any time form a part or any or all of said trust funds, and to execute leases, conveyances and transfers thereof, on such terms and conditions as to them shall seem wise and proper.

It is my wish, however, which I hereby express to my trustees, that within five (5) years after my death the property constituting the various trusts hereby created shall be so invested
59 that at least fifty (50) per cent. in value of each of said trust funds shall be invested in securities then constituting legal investments for savings banks, executors or trustees, or in unencumbered real property situate in the retail business districts of cities of at least two hundred thousand (200,000) population, unless in the opinion of my said trustees additional time is required to accomplish such investments, and then, and in that event, I desire that such investments be made at an early date after the expiration of said five (5) years.

ARTICLE TWENTY-THIRD. In addition to the powers hereinbefore conferred upon the trustees of the various trusts created by the terms of this my last Will and Testament, I hereby grant full power and authority to my said trustees to invest portions of the trust funds of any of the trusts herein created in unencumbered real estate situate in the retail business districts of any cities in the State of New York, having a population of more than two hundred thousand (200,000), provided, however, that not more than twenty (20) per cent. of the value of any trust fund shall be at any one time so invested in real property.

ARTICLE TWENTY-FOURTH. I further will and direct that in the event that I shall own any or all of the following parcels of real

estate, now owned by me, at the time of my death, that the same may be transferred by my executors to the trustees of any of the trusts created by the provisions of Article Twenty-first hereof, and accepted by said trustees as a part of said trust funds at the valuations fixed by the appraisers in the proceedings for determining the amount of the transfer tax under the laws of the State of New York:

The property known as Nos. 416–418 Main Street in the City of Buffalo, N. Y.;

60 The property known as Nos. 446–448 Main Street in the City of Buffalo, N. Y.;

The property now owned by me in the City of Kansas City, Mo.;

The property now owned by me in the City of Toledo, O.;

The property now owned by me in the City of Akron, O.

It is my suggestion to my executors and trustees, although not binding in case changed conditions shall render it unwise, that the property known as Nos. 416–418 Main Street, in the City of Buffalo, N. Y., shall become a part of the trust created for the benefit of my daughter, Dorothy Knox, and that the property known as Nos. 446–448 Main Street, in the City of Buffalo, N. Y., shall become a part of the trust created for the benefit of my daughter, Marjorie Knox.

ARTICLE TWENTY-FIFTH. I hereby further authorize and empower my said executors, in the administration of my said estate to determine and make the division of my property and estate unto the various trust funds created by the provisions of Article Twenty-first hereof, as in their judgment shall seem wise and proper, and I further authorize any of my said trustees in the event of a division being necessary of any trust funds hereby created in accordance with the terms and direction of this Will, to make such division both of real and personal property, and to execute such conveyances and transfers as may be necessary to effect the same. The action of my executors and any of said trustees, pursuant to the authority of this my last Will and Testament, to be binding upon all parties interested in my estate and in any such trust fund. I further will and direct that should any parcel of real estate owned by me at the time of my death become a part of any of the trust funds created by the terms

61 of Article Twenty-first of this my last Will and Testament at the appraised value thereof, as hereinbefore stated, that the trustees of the remaining trusts created by the terms of said Article Twenty-first hereof shall, upon request, execute proper and suitable conveyances of their interest in said parcel or parcels of real estate, so as to effectually vest the title thereof

in the trustees of the trust fund of which said parcel of rea estate may become a part.

ARTICLE TWENTY-SIXTH. I hereby nominate, constitute, and appoint my wife, Grace M. Knox, to be the executrix, and my brother, Henry D. Knox, and Walter P. Cooke, both of the City of Buffalo, to be the executors, of this my last Will and Testament, hereby giving and granting to my executors full power and authority to sell and convey any and all property, real, personal or mixed, of which I may die seized or possessed, or in which I may have any interest. I hereby will and direct that no bond or other security shall be required of my said executors or of any of the trustees of the various trusts created by this my last Will and Testament. I hereby will and direct that my executors shall have three (3) years from and after my decease in which to settle my estate and to distribute the same in accordance with the provisions hereof, and may retain from time to time as a part of my estate any and all real property, stocks, bonds, securities, and other property, which may form a part of my estate at the time of my death, hereby granting unto my said executors full power and authority to exchange such stocks, bonds, or other securities for any other stocks, bonds, or other porperty upon any consolidation, merger, or other reorganization of any of the companies whose stocks or securities are so held.

I hereby authorize my executors and trustees to pay out of the income and revenues of my said estate, or of each trust fund
62 herein created, all taxes or assessments which shall be imposed or assessed upon the real or personal property belonging to my estate or to any such trust fund, all amounts necessary for insurance premiums, repairs, and generally all other expenses necessary or proper in the management or preservation of such trust funds or estate, each such trust fund bearing, so far as practicable, its own burden.

I further will and direct that in view of the provisions herein contained for her benefit, that my wife, Grace M. Knox, serve as executrix of this my last Will and Testament, without fees, commissions, or compensation, and I further will and direct that in lieu of the commissions and compensation provided by law, that each of my acting executors, administrators with the will annexed, or trustees, whether herein appointed or appointed by the court, excepting only the Bankers Trust Company of Buffalo, as Trustee of the various trusts created by Articles Thirteenth, Fifteenth, Sixteenth, and Seventeenth hereof, shall during his service as such receive an annual compensation of Twelve thousand dollars ($12,000) each, to be paid out of the income of my estate and the trust funds herein contained and apportioned ratably

between the said estate and the said trust funds created by the provisions of Article Twenty-first hereof in substantial proportion to the value of the property contained in each, from time to time, such sum to be received in full payment for his services as such executor, administrator, and trustee under this Will, and to cover the entire services of each, both as executor, administrator, and trustee. I hereby expressly will and direct that the appointment of any other executor, trustee, or administrator with the will annexed which may be made by any court, shall be upon the express condition that every such executor, trustee, or administrator shall at the time of his appointment, accept the
63 compensation above provided for his services, in lieu of commissions or compensation provided by law. I will and direct that the Bankers Trust Company of Buffalo in acting as trustee of Articles Thirteenth, Fifteenth, Sixteenth, and Seventeenth hereof shall receive the usual commissions for such services as allowed by law.

Any executor or trustee, however, may during the period of his administration of my estate serve as director, officer or attorney of corporations whose stocks, bonds, or other securities may form a part of my estate, or any trust fund, and may be compensated for such service by such corporations.

ARTICLE TWENTY-SEVENTH. I hereby will and direct that any reference contained in this my last Will and Testament to my executors or to my trustees shall be deemed and construed to refer with equal force to the survivor or survivors of any of my executors or to the survivor or survivors of any trustees of any trust fund herein mentioned, and to any additional executors or trustees when their appointment is effected. And I hereby nominate, constitute, and appoint my son, Seymour H. Knox, to be one of the executors of this my last Will and Testament and one of the trustees of every trust herein created upon his reaching the age of twenty-one (21) years and with the same force and effect as though he were now included as an executor and as a trustee of each of the trusts hereby created, and subject to the same provisions as to compensation as herein provided for my executors, other than my wife and the Bankers Trust Company of Buffalo.

ARTICLE TWENTY-EIGHTH. The provisions herein contained for the benefit of my said wife, Grace M. Knox, are to be
64 accepted by her in lieu of any dower or right of dower in any real property of which I may die seized or possessed, or in which I may have any interest, and are also to be received by her in lieu of any right to receive fees, commissions or other compensation as executrix of this my last Will and Testament.

ARTICLE TWENTY-NINTH. I hereby will and direct that no one

of my children shall be charged with any advance or advancements made by me to such children during my lifetime.

ARTICLE THIRTIETH. It is my desire, if my executors approve, that all of my trotting-bred horses, harnesses and sulkies, used in connection therewith, owned by me at the time of my death, excepting only such as may be selected by Benjamin F. White, pursuant to the provisions of Article Eighth hereof, be sold by my executors at the Fasig-Tipton Sales in New York City.

ARTICLE THIRTY-FIRST. I will and direct that the income on the trusts created by Article Twenty-first of this will shall commence from the time of my death, and I authorize and direct my executors to make payments on account of said income in their discretion prior to the creation of the trusts, which payments shall be accepted by the beneficiaries in lieu of corresponding payments from the trustees.

ARTICLE THIRTY-SECOND. I direct that my executors be not required to file any inventory of my said estate.

I direct my executors to make, from time to time, at the request of any of the beneficiaries of any of the trusts herein created, semi-annual statements certified by them, showing as to each beneficiary the condition of the trust estate in which he or she is interested, and the receipts, disbursements, sales and investments in connection therewith.

65

ARTICLE THIRTY-THIRD. I hereby nominate, constitute, and appoint my wife, Grace M. Knox, to be the Testamentary Guardian of my three children, Dorothy Knox, Seymour H. Knox, and Marjorie Knox.

ARTICLE THIRTY-FOURTH. In case for any reason any legacy or devise herein contained shall lapse or shall become, for any reason whatever, incapable of performance, then and in that event, I give, devise, and bequeath such legacy and devise of real estate, in case any part of it shall consist of real estate, to my said wife, Grace M. Knox, knowing that she will, so far as possible, carry out my express desires in relation to the same.

ARTICLE THIRTY-FIFTH. I hereby revoke and forever annul any and all other will or wills and codicils thereto by me at any time made.

In witness whereof, I have hereunto set my hand and seal this twelfth day of May, in the year of our Lord one thousand nine hundred and fifteen (1915).

SEYMOUR H. KNOX [SEAL]

The foregoing instrument, consisting of twenty-three (23) pages, was on the day of the date therof, signed, sealed, published, and declared by the Testor therein named, as and for his

last Will and Testament, in the presence of us and each of us, who, at his request and in his presence and in the presence
66 of each other, have hereunto set our names as attesting witnesses thereto.

DAN'L J. KENEFICK,
Residing at Buffalo, N. Y.

GUY WELLMAN,
Residing at Buffalo, N. Y.

CHARLES H. TAYLOR,
Residing at Buffalo, N. Y.

67 *Respondent's exhibit A*

At a Surrogate's Court held in and for the County of Erie, State of New York, at the Surrogate's Office, in the City of Buffalo, in said County, on the 24th day of May 1921.

Present: Hon. LOUIS B. HART, Surrogate.

In the Matter of the Judicial Settlement of the Accounts of Grace M. Knox, Henry D. Knox, and Walter P. Cooke, as Executors of the Last Will and Testament of Seymour H. Knox, Deceased.

Grace M. Knox, Henry D. Knox, and Walter P. Cooke as Executors of the Last Will and Testament of Seymour H. Knox, late of the City of Buffalo, in said county, deceased, having heretofore presented to this court their petition praying for a judicial settlement of their accounts as such executors, dated December 20, 1920, and this court having thereupon duly issued a citation requiring the persons interested in the estate of said deceased named in said petition to be and appear in this court on the 1st day of February 1921, at ten o'clock in the forenoon of that day and attend the judicial settlement of the account of the said executors,

68 And satisfactory proof having been filed of the due service of said citation personally within the State on Dorothy Knox Goodyear, Seymour H. Knox, Marjorie Knox, and Grace M. Knox as appears by the affidavit of William C. Warren, Jr., verified the 7th day of January 1921, presented to and filed with this court, and said petitioners having presented to and filed with this court an instrument in writing signed by Burtis L. Knox, legatee, and a person interested in the estate of said deceased, acknowledged and approved as required by law, in which he waives the issue and service on him of a citation to attend said judicial settlement and consents to the making of this decree;

And Louis E. Desbecker, Esq., counselor at law, having been duly appointed special guardian for said Marjorie Knox, infant, by an order duly made in this proceeding by this court, and said Louis E. Desbecker having executed his written consent, to act as such special guardian, and having verified the usual affidavit of his ability to act as such special guardian and said consent and affidavit having been duly filed with said court in this proceeding, and this proceeding having been duly and regularly adjourned to this day and this day appeared the said petitioners in person and by Daniel J. Kenefick, Esq., their attorney, and said Marjorie Knox having appeared by said Louis E. Desbecker, her special guardian, and by Grace M. Knox, her mother and guardian, and said Grace M. Knox, Henry D. Knox, and Walter P. Cooke as such executors having presented and filed their account, together with vouchers in support thereof, and said Louis E. Desbecker having executed his consent and recommendation in writing to the effect that the account submitted by the executors should be passed and judicially settled as filed and
69 that this decree submitted to him is in all respects satisfactory, which consent and recommendation is herein attached and made a part of this decree.

Now on motion of Daniel J. Kenefick, Esq., attorney for said executors, and after hearing the proofs and allegations of the parties and examining said account and due deliberation having been had thereon,

I. It is ordered, adjudged, and decreed that the account of said Grace M. Knox, Henry D. Knox, and Walter P. Cooke as such executors, dated December 20, 1920, be and the same hereby is finally and judicially settled and allowed as filed and the Surrogate makes and records the following summary thereof:

The executors are debited and credited as follows:

DEBIT

With amount of Schedule A	$26,233,760.31

CREDIT

With amount of Schedule B	$20,671,098.49	
With amount of Schedule C	1,172,186.00	
With amount of Schedule D	551,755.95	
With amount of Schedule E	3,493,406.83	
		25,888,447.27
		$345,313.04

II. And it is further ordered that out of said balance the said executors pay to Louis E. Desbecker, Esq., the said special guardian, the sum of $5,000.00 hereby awarded him in full of his compensation for services rendered in this proceeding.

70 III. And it appearing to the satisfaction of this court that the executors were authorized and directed by Article Second of the will as the testator to cause to be erected in Forest Lawn Cemetery, in the City of Buffalo, N. Y., a suitable monument and mausoleum at an expense of not exceeding $50,000, and that pursuant to said authority and direction, the executors have caused to be erected in Forest Lawn Cemetery in the City of Buffalo, N. Y., a mausoleum at an expense of $25,345.83,

It is ordered adjudged, and decreed that the action of the executors in caus g said mausoleum to be erected and in expending therefor the um of $25,345.83 be and the same hereby is ratified and approved.

IV. And it appearing to the satisfaction of this court that the testator by the Eleventh clause of his will bequeathed to the Methodist Episcopal Church located at Russell, St. Lawrence County, New York, fifty shares of the common capital stock of F. W. Woolworth Company in trust for the following purposes, the shares of stock so bequeathed to be held or sold and the proceeds invested and from time to time reinvested and the net income thereon used to assist in defraying the current expenses of said church; and that in accordance with said bequest the executors on or about the 14th day of March 1916, transferred fifty shares of the comon capital stock of the F. W. Woolworth Company to The Board of Trustees of the Methodist Episcopal Church of Russell, N. Y., upon said corporation entering into an agreement under seal to hold the same in trust for the purpose and upon the terms and conditions set forth in Article Eleventh of the will of the testator,

71 It is ordered, adjudged, and decreed that the action of the executors in transferring and delivering said stock to said corporation upon its executing said agreement, be and the same hereby is ratified and approved.

V. And it appearing that by the Fifth Article of the will of the testator, he had bequeathed an annuity of $1,200 per year to his brother, Burtis L. Knox, and directed his executors to pay over said annuity to said Burtis L. Knox in quarterly payments of $300 during his natural life, and that the testator directed his executors to set aside the sum of $30,000 for the purpose of producing said annuity and that at the death of said Burtis L. Knox, the testator devised and bequeathed the property so set aside to produce said annuity to his son, Seymour H. Knox, if he be then living, if not, to his daughters, Dorothy Knox and Marjorie Knox, to be divided between them share and share alike; and that he further provided that notwithstanding the foregoing provisions, in case said Burtis L. Knox should be living on the 1st day of January 1933, that in that event all the prop-

erty held to provide such annuity should become the property of said Burtis L. Knox.

It is further ordered, adjudged, and decreed that said executors be and they hereby are ordered and directed to set aside $30,000 and to hold and invest the same for the purposes and upon the terms and conditions set forth in Article Fifth of the will of the testator and that such sum be deemed to have been set aside as of the death of the testator and the annual payment of $1,200 made in each year by the executors to said Burtis L. Knox shall be accepted by him with the same force and effect as though paid for the income derived from said sum of $30,000.

72 VI. The Surrogate notes that the trustees of the various trusts created by the will of the testator, including Seymour H. Knox, now of full age, have duly executed their oaths and consents to act as trustees of the several trusts, and that the same are on file in this court, and that Seymour H. Knox, having become of age has qualified as executor by executing his oath of office which is on file in this office.

VII. And it appearing from the account to the satisfaction of this court that the total amount of income received by the executors from the time of their appointment to the date of said account is $6,366,973.35, and that the expenses of administration, executors' compensation, taxes, etc., properly deductible therefrom amount to $538,912.36 leaving a net income of $5,828,860.99; and it further appearing that of said amount the sum of $1,109,896.89 represents income on the bank stock specifically bequeathed in trust for Seymour H. Knox by paragraph C of Article Twenty-first of the will of the testator; and it further appearing that the balance of the net income after deducting an annuity of $1,200 per year payable to Burtis L. Knox should be divided as follows: Grace M. Knox, 40%; Dorothy Knox Goodyear, 20%; Seymour H. Knox, 20%; and Marjorie Knox, 20%, and that during the period embraced in this accounting the whole of said income has not been so distributed and that the said parties are entitled to interest on the undrawn portion of their distributive shares thereof as follows:

Seymour H. Knox	$141,105.49
Grace M. Knox	56,453.48
Dorothy Knox Goodyear	46,789.79
Marjorie Knox	71,335.96
Total	$315,684.72

73 which said amount, together with said sum of $1,109,986.89 payable to Seymour H. Knox as aforesaid should be deducted from said net income leaving a balance of $4,402,479.38 to be distributed as follows:

40% to Grace M. Knox	$1,760,991.75
20% to Seymour H. Knox	880,495.87
20% to Dorothy Knox Goodyear	880,495.88
20% to Marjorie Knox	880,495.88

And it further appearing that the payments on account of income during the period covered by this accounting are as follows:

Grace M. Knox	$1,319,979.39
Seymour H. Knox	669,105.66
Dorothy Knox Goodyear	449,774.67
Marjorie Knox	260,422.11

And it further appearing that during the period covered by this accounting the executors have expended certain moneys for bank stocks for Seymour H. Knox, having in his behalf exercised certain rights to purchase stock coming to them by virtue of the holdings of stocks specifically bequeathed for him and that the amount of money so invested less the cash distribution of principal received by virtue of said holdings, amounts to $41,512.98, which should be deducted from income due him.

And it further appearing that the amount now due to each of said interested parties on account of income to the date of the report is as follows:

74

Grace M. Knox 40% of net income	$1,760,991.75
Interest	56,453.48
	1,817,445.23
Less amount drawn	1,319,979.39
Balance due	$497,465.84
Seymour H. Knox 20% of net income	880,495.87
Interest on undrawn income	141,105.49
Bank dividends	1,109,896.89
	2,131,498.25
Less amount drawn	669,105.66
Balance	1,462,392.59
Less bank investments	41,512.98
Balance due	1,420,879.61
Dorothy Knox Goodyear 20% of net income	$880,495.88
Interest on undrawn income	46,789.79
	927,285.67
Less amount drawn	449,774.67
Balance due	$477,511.00
Marjorie Knox 20% of net income	$880,495.88
Interest on undrawn income	71,335.96
	951,831.84
Less amount drawn	260,422.11
Balance due	$691,409.73

75 It is further ordered, adjudged, and decreed that the executors pay to Grace M. Knox, Seymour H. Knox, Dorothy Knox Goodyear, and Marjorie Knox, the above mentioned balances in full of all unpaid income and interest thereon due to the date of this accounting and that up to the sum of $477,511, being the lowest amount of said income payments due, the executors pay the same by transferring and delivering to the parties entitled thereto bonds belonging to the estate at their appraised value or cost, and that the balance of said amounts be paid in cash or at the election of the parties entitled to receive said payments in securities at their appraised value or cost, but at no lesser value than present market.

And it is further ordered, adjudged, and decreed that the above balance of $691,409.73 directed to be paid to Marjorie Knox be paid to Henry D. Knox, Walter P. Cooke, and Seymour H. Knox as Trustees for Marjorie Knox, and that the same be paid $477,511 in bonds and the balance in cash or securities as hereinabove directed.

VIII. And it appearing to the satisfaction of this Court that the sales, purchases and exchanges of properties and securities made by executors during the period embraced by this account were in accordance with the authority vested in them by the will of the testator, and were also to the best interest of said estate and the persons interested therein,

It is ordered, adjudged, and decreed that the action of the executors in making the various exchanges, purchases, and sales of properties and securities as set forth in said account be and the same hereby are ratified and approved.

76 IX. And it is further ordered, adjudged, and decreed that all payments of income made by the executors or herein directed to be made by them, shall be construed to be and shall be accepted by the various interested parties as payments of income on account of their respective interests in the estate and in the trusts created for their benefit with the same force and effect as though paid to them by the Trustees named in said Last Will and Testament of Seymour H. Knox, deceased, and said trustees shall be and they hereby are relieved and exonerated from paying to the said interested parties any income on said trust funds for the period covered by said account.

X. And it appearing by Article Twenty-fourth of the will of the testator that it was the wish of the testator that the property known as 416–418 Main Street in the City of Buffalo, New York, should become a part of the trust created for the benefit of Dorothy Knox Goodyear, and that the property known as 446–448 Main Street, Buffalo, N. Y., should become a part of the trust created for the benefit of Marjorie Knox,

It is ordered, adjudged, and decreed that the executors transfer and convey to Henry D. Knox, Walter P. Cooke and Seymour H. Knox, as Trustees for the benefit of Dorothy Knox Goodyear, pursuant to the provisions of paragraph B of Article Twenty-first of said will, said property known as 416–418 Main Street in the City of Buffalo, New York, at the value of $414,000, being the appraised value thereof.

And it is further ordered, adjudged, and decreed that the executors transfer and convey to Henry D. Knox, Walter
77 P. Cooke, and Seymour H. Knox as trustees for the benfit of Marjorie Knox, pursuant to the provisions of paragraph D of Article Twenty-first of said will said property known as 446–448 Main Street in the City of Buffalo, N. Y., at the value of $464,439.89, being the appraised value of said property plus the cost of improvements made by the executors.

XI. It is further ordered, adjudged, and decreed that the executors in their discretion distribute the balance of the real estate in their hands at the appraised value of the several parcels between the trusts created for the benefit of Grace M. Knox by the provisions of paragraph A of Article Twenty-first of the will of the testator and the trust created for the benefit of Seymour H. Knox pursuant to the provisions of Paragraph C of Article Twenty-first of the will of the testator.

And is it further ordered, adjudged, and decreed that the executors on conveying the real estate to the various trusts or so much as they may determine to convey to the trusts, shall concurrently therewith transfer to the trustees of each of said four trusts, sufficient securities belonging to the estate at their appraised value or cost to equalize the difference in the value of the parcel or parcels of real estate received by each of said trusts, to the end that the appraised value of such real estate and such securities so transferred to equalize such value shall be equal as to each of such trusts except that the trust created for the benefit of Grace M. Knox shall be twice the amount of either of the others.

XII. And it appearing further that the testator by the provisions of Article Twenty-fifth of his said will has authorized
78 and empowered his executors in the administration of his said estate to determine and make division of his property and estate among the various trust funds created by the provisions of Article Twenty-first thereof as in their judgment shall seem wise and proper.

It is further ordered, adjudged, and decreed that the executors shall from time to time as in their judgment seems wise and proper, make division of the property and estate remaining in their hands, or so much thereof as from time to time they think wise, after making provision for carrying out the terms and con-

ditions of this decree into the various trust funds created by the provisions of said last will and testament and in accordance with the terms thereof, any balance of cash or property remaining in the hands of the executors to be subject to the payment therefrom of any further debts or obligations of the testator and the expenses of administration and final distribution in accordance with the terms of said will.

And it is further ordered, adjudged, and decreed, that from and after the creation of said trust funds the executors and trustees may in their discretion apportion the expenses of administration and the other disbursements among the four trusts hereinbefore mentioned and the estate, so long as any portion of said estate remains undivided.

The Surrogate notes that the executors have this day filed in this court receipts and releases duly executed by the following named legatees showing full payment of the several specific bequests to them contained in the will of the testator: Henry D. Knox, Burtis L. Knox, Catherine Avery, The Home of the Friendless, the Charity Organization Society of Buffalo,
79 Buffalo Fine Arts Academy, William T. Damon, Seymour K. Fowler, Sherman Damon, Charles Knowlton, Bertha L. Daigler, Lucy Kranichfeld, Margaret Reilly, Benjamin F. White, (2) Paul J. Kingston, John Thoman, William Timm, Herman Timm, Edward Kingston, Louis Sissler, Charles Curtis, Charles Sissler, Aloise Burghardt; also receipt and release duly executed by Henry D. Knox, General Guardian of Priscilla Knox, Alice Knox and James H. Knox, showing full payment of the specific bequests to them contained in the will of the testator; also receipts and releases duly executed by Bankers Trust Company of Buffalo and Walter P. Cooke, as trustees, showing the receipt by them of the property bequeathed in trust by the will of the testator for Verona Knox, Ethel Knox, Carrie D. Fowler and Raymond P. Fowler; also receipt and release executed by the Board of Trustees of the Methodist Episcopal Church of Russell, N. Y., showing the receipt of the property specifically bequeathed in trust by the will of the testator, together with an agreement executed by the Board of Trustees of the Methodist Episcopal Church of Russell, N. Y., to hold said property in trust in accordance with the terms of the will of the testator.

L. B. HART, *Surrogate.*

STATE OF NEW YORK,
County of Erie, Surrogate's Office, ss:

I, George T. Vandermeulen, Clerk of the Surrogate's Court of the said county of Erie, do hereby certify that I have com-

pared the foregoing and annexed copy of Decree—in the
80 matter of the judicial settlement of the accounts of Grace M. Knox, Henry D. Knox and Walter P. Cooke, as executors of the Last Will and Testament of Seymour H. Knox, deceased with the original record thereof now remaining in this office, and have found the same to be a correct transcript therefrom, and of the whole of such original record.

[SEAL]

In witness whereof, I have hereunto set my hand and affixed the seal of said Surrogate's Court, at Buffalo, N. Y., this 12th day of December 1938.

No. 53273.

G. T. VANDERMEULEN,
Clerk of Surrogate's Court.

[Surrogate's Court, Erie County. In the Matter of the Judicial Settlement of the Accounts of Grace M. Knox and others as executors of vs. Seymour H. Knox, Deceased. Decree.]

81 Before United States Board of Tax Appeals

Docket No. 77827

[Same title.]

R. M. Andrews, Esq., John L. Kenefick, Esq., and Ernest J. Brown, Esq., for the petitioner. W. H. Schwatka, Esq., and E. L. Updike, Esq., for the respondent.

Memorandum opinion

MURDOCK: The Commissioner determined a deficiency of $35,645.83 in the petitioner's income tax for the calendar year 1930. The petitioner has waived the only assignment of error which he made to the determination of the Commissioner, and the only issues for decision are presented by the Commissioner by way of an answer in an effort to increase the deficiency which he has determined. Those issues are—first, whether the petitioner's basis for gain or loss on certain shares of stock which he sold during the taxable year was the cost of those shares to trustees under his father's will, as the Commissioner now contends, or was the fair market value of the shares at the time they were distributed to the petitioner, and, second, whether they were held by the petitioner only from the date they were received by him in the distribution, or whether, as the respondent now contends, they were held by the petitioner from the date

they were purchased by the trustees. The Board adopts as its findings of fact the stipulation filed by the parties, together with respondent's exhibit A.

82 Seymour H. Knox, the father of the petitioner, died on May 16, 1915. His will provided that the residuary estate should be divided into four parts and that one part, consisting of 20 per cent of the whole, be placed in trust for this petitioner. The will provided, with respect to the portion placed in trust for this petitioner, that it was so placed for the following uses and purposes:

"To receive, hold and, from time to time, invest and reinvest the same, and to collect the rents, income, issues and profits on the property from time to time constituting said trust fund and to pay over so much of the net income thereon as to my said trustees shall seem wise and proper toward the support, maintenance and education of my son, Seymour H. Knox, until he shall arrive at the age of twenty-one (21) years, and to accumulate the balance of the income during his minority for his benefit, and to pay over such accumulated income to him when he shall arrive at the age of twenty-one (21) years, and thereafter to pay over the entire net income on said trust fund until he shall arrive at the age of twenty-five (25) years, at which time, I give, devise and bequeath to my said son, Seymour H. Knox, a portion of said trust fund, to wit, Five hundred thousand dollars ($500,000), and direct my executors to pay over said sum of Five hundred thousand dollars ($500,000) to my said son, Seymour H. Knox, and thereafter to pay over the net income on the trust fund remaining in their hands to my said son until he shall arrive at the age of thirty (30) years, at which time I give, devise and bequeath one-half (½) of the trust fund then remaining in the hands of my said trustees to my said son, Seymour H. Knox,

83 and I direct my said trustees to transfer and convey the same to him and thereafter to pay over the net income arising on the trust fund remaining in their hands to my said son, Seymour H. Knox, until he shall arrive at the age of thirty-five (35) years, at which time I give, devise and bequeath the balance of said trust fund unto my said son, Seymour H. Knox. In case of the death of my said son, Seymour H. Knox, prior to the time when he shall arrive at the age of thirty-five (35) years, I give, devise and bequeath all of said trust fund which may not then have been paid over to him, or to the possession of which he may not at the time of his death have been entitled, unto his issue, if any, him surviving, to be divided among them, share and share alike. And in the event that there be no issue him sur-

viving, I give, devise and bequeath the balance of said trust fund unto his heirs."

It further provided that the trustees should have full power to sell, exchange, or dispose of any property in the trust fund, and expressed the wish of the testator that within five years after his death, or as soon thereafter as possible, 50 per cent of the value of the trust fund shall be invested in securities constituting legal investments for executors or trustees or in unencumbered real property.

The trustees purchased 13,660 shares of stock of Marine Share Corporation on August 31, 1927, for $273,200, and on August 30, 1928, purchased 3,415 additional shares on rights for $102,450.

The petitioner attained the age of thirty years on September 1, 1928, and became entitled to receive and did receive on that date one-half of the trust fund then remaining in the hands of the trustees. 5,160 of the original 13,660 shares and all of
84 the 3,415 shares purchased by the trustees were delivered to the petitioner as a part of the above distribution on September 1, 1928. The fair market value of those shares on that date was $473,768.75. The petitioner exchanged those shares thereafter in a nontaxable exchange and sold the shares received in that exchange on June 10, 1930, for $287,193.67.

The Commissioner, in his determination of the deficiency, allowed the petitioner an ordinary loss of $186,575.08 on the sale. That loss was the difference between the amount realized and the fair market value of the Marine Share Corporation shares on September 1, 1928. The respondent now contends that the shares had a basis for gain or loss in the hands of the petitioner equal to the cost of the shares to the trustees and that the petitioner held the shares from the date of purchase by the trustees, so that he realized a capital gain of $79,293.58 on the sale of a part of the shares and an ordinary loss of $13,687.41 on the sale of the remainder.

The question of whether the petitioner is entitled to use as his basis the fair market value of the property at the time it was distributed to him on September 1, 1928, is decided for the petitioner on authority of Marjorie K. Campbell, 39 B. T. A. No. 133 (5/19/39) and cases there cited. The trusts in the two cases were created by the same will and are substantially identical. Here the respondent concedes that a number of cases cited in the Campbell case are against him. The next question is whether the period of holding by the trustee should be tacked on to the period that the securities were held by the petitioner for the purpose of determining whether they were capital assets under the provisions of section 101 (c) (3) of the Revenue Act of 1928. That

section contains several special provisions for tacking on to the period of holding by the taxpayer a period of holding by some other taxpayer. None of those provisions applies in the
85 present case. It seems reasonable to infer from the fact that Congress has made these special provisions but has not made any special provision to cover a case like the present, that Congress did not intend to tack on any period to the holding of a taxpayer in the situation of this one. Furthermore, no logical reason has been suggested for tacking on the period of holding by the trustee. That trustee was a different taxpayer. It had complete domination and control over the securities in question until the very moment they were distributed to this taxpayer. This taxpayer had no dominion or control over the securities and indeed no vested interest in the particular securities prior to the date of the distribution. He held the securities only from September 1, 1928. Richard Van Nest Gambrill, 38 B. T. A. 981.

Decision will be entered in accordance with the notice of deficiency.

Enter:

Entered May 19, 1939.

86 Before United States Board of Tax Appeals

Docket No. 77827

[Same title.]

Decision

The respondent on June 13, 1939, filed a proposed computation pursuant to the Board's Memorandum Opinion entered May 19, 1939. The petitioner on June 23, 1939, filed a notice of acquiescence to the respondent's computation. Therefore, it is ordered and decided, that there is a deficiency in income tax for the year 1930 in the amount of $42,842.24.

(Signed) J. E. MURDOCK,
Member, United States Board of Tax Appeals.

Enter:

Entered June 30, 1939.

87 In United States Circuit Court of Appeals for the Second Circuit

BTA Docket No. 77827

GUY T. HELVERING, Commissioner of Internal Revenue, PETITIONER ON REVIEW

v.

SEYMOUR H. KNOX, RESPONDENT ON REVIEW

Petition for review and assignments of error

Filed Sept. 22, 1939

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Now comes Guy T. Helvering, Commissioner of Internal Revenue, by his Attorneys Samuel O. Clark, Jr., Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and Claude R. Marshall, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I

JURISDICTION

That the petitioner on review (hereinafter sometimes referred to as the Commissioner) is duly appointed, qualified, and
88 acting Commissioner of Internal Revenue of the United States, appointed and holding his office by virtue of the laws of the United States; that Seymour H. Knox, the respondent on review (hereinafter sometimes referred to as the taxpayer) is an individual residing in the City of Buffalo, New York; that the said Seymour H. Knox filed his Federal individual income tax return for the taxable year 1930 in the office of the Collector of Internal Revenue for the 28th District of New York, located at Buffalo, New York, which said collection district is within the jurisdiction of the United States Circuit Court of Appeals for the Second Circuit.

The Commissioner files this petition pursuant to the provisions of Sections 1001, 1002, and 1003 of the Revenue Act of 1926, as amended by Section 603 of the Revenue Act of 1928, as amended by Section 1101 of the Revenue Act of 1932, as amended by Section 519 of the Revenue Act of 1934, and subsequent revenue acts.

II

PRIOR PROCEEDINGS

On August 15, 1934, the Commissioner of Internal Revenue, pursuant to the provisions of Section 272 (a) of the Revenue Act of 1928 as amended by Section 501 of the Revenue Act of 1934 (49 Stat. 755) sent the taxpayer by registered mail a notice of deficiency advising him that the determination of his income tax liability for the year 1930 disclosed a deficiency in the amount of $35,645.83. Thereafter, on November 12, 1934, a petition was filed by the taxpayer with the United States Board of Tax Appeals, requesting a redetermination of the deficiency determined in the aforesaid notice of deficiency. On January 9, 1935, the Commissioner filed an answer to the petition, and thereafter, on July 20, 1937, filed with the Board of Tax Appeals a motion for leave to file an amended answer claiming an increased deficiency in tax and on the same day lodged an amended answer. The motion to amend was granted July 24, 1937, and the amended answer filed. On September 1, 1937, the taxpayer filed his reply.

89

On December 14, 1938, the Commissioner was granted leave to amend the amended answer, which amendment to the amended answer was filed on the same day.

This proceeding and the cases of Dorothy K. G. Rogers, Docket No. 84640 and Marjorie K. Campbell, Docket No. 84639, were heard on December 14, 1938, at Washington, D. C. On May 19, 1939, the Board entered its memorandum opinion, which was subsequently modified on June 1, 1939, by providing that the decision shall be entered under Rule 50, instead of in accordance with the notice of deficiency. On June 30, 1939, the Board entered its decision ordering and deciding that there is a deficiency in income tax for the year 1930 in the amount of $42,842.24.

III

NATURE OF THE CONTROVERSY

Seymour H. Knox, the father of the taxpayer died on May 16, 1915. His will provided that the residuary estate should be divided into four parts and that one part, consisting of 20 per cent of the whole, be placed in trust for this taxpayer. The will provided, with respect to the portion placed in trust for the taxpayer that it was so placed for the following uses and purposes:

"To receive, hold, and, from time to time, invest and reinvest the same, and, to collect the rents, income, issues,
90 and profits on the property from time to time constituting said trust fund and to pay over so much of the net income thereon as to my said trustees shall seem wise and proper toward the support, maintenance, and education of my son, Seymour H. Knox, until he shall arrive at the age of twenty-one (21) years, and to accumulate the balance of the income during his minority for his benefit, and to pay over such accumulated income to him when he shall arrive at the age of twenty-one (21) years, and thereafter to pay over the entire net income on said trust fund until he shall arrive at the age of twenty-five (25) years, at which time, I give, devise, and bequeath to my said son, Seymour H. Knox, a portion of said trust fund, to wit, Five Hundred Thousand Dollars ($500,000.00), and direct my executors to pay over said sum of Five Hundred Thousand Dollars ($500,000.00) to my said son, Seymour H. Knox, and thereafter to pay over the net income on the trust fund remaining in their hands to my said son until he shall arrive at the age of thirty (30) years, at which time I give, devise, and bequeath one-half (½) of the trust fund then remaining in the hands of my said trustees to my said son, Seymour H. Knox, and I direct my said trustees to transfer and convey the same to him and thereafter to pay over the net income arising on the trust fund remaining in their hands to my said son, Seymour H. Knox, until he shall arrive at the age of thirty-five (35) years, at which time I give, devise, and bequeath the balance of said trust fund unto my said son, Seymour H. Knox. In case of the death of my said son, Seymour H. Knox, prior to the time when he shall arrive at the age of thirty-five (35) years, I give, devise, and bequeath all of said trust fund which
91 may not then have been paid over to him, or to the possession of which he may not at the time of his death have been entitled, unto his issue, if any, him surviving, to be divided among them, share and share alike. And in the event that there be no issue him surviving, I give, devise, and bequeath the balance of said trust fund unto his heirs."

The will further provided that the trustees should have full power to sell, exchange, or dispose of any property in the trust fund, and expressed the wish of the testator that within five years after his death, or as soon thereafter as possible, 50 percent of the value of the trust fund should be invested in securities constituting legal investments for executors or trustees or in unencumbered real property.

The trust was formally set up on July 1, 1921, and the executors on that date transferred of record and delivered to the trustees the property as provided in the will. The trustees purchased 13,660 shares of stock of Marine Share Corporation on August 31, 1927, for $273,200.00 and on August 30, 1928, purchased 3,415 additional shares on rights for $102,450.00.

The taxpayer attained the age of thirty years on September 1, 1928, and thereupon on that date said trustees, pursuant to the terms of the aforementioned will, transferred of record and delivered to taxpayer certain securities and property including 5,160 of the original 13,660 shares and all of the 3,415 shares purchased by the trustees. The fair market value of those shares on that date was $473,768.75. The taxpayer exchanged those shares thereafter in a nontaxable exchange for 17,150 shares of capital stock of the Marine Union Investors, Inc., and sold the shares received in that exchange on June 10, 1930, for $287,193.67.

92 The Commissioner, in his determination of the deficiency, allowed the petitioner an ordinary loss of $186,575.08 on the sale. That loss was the difference between the amount realized and the fair market value of the Marine Share Corporation shares on September 1, 1928. The Commissioner in his amended answer claimed that the shares had a basis for gain or loss in the hands of the taxpayer equal to the cost of the shares to the trustees and that the taxpayer held the shares from the date of purchase by the trustees, so that he realized a capital gain of $79,293.58 on the sale of the shares acquired August 31, 1927, and an ordinary loss of $13,687.41 on the sale of the remainder acquired August 30, 1928.

The Board of Tax Appeals held that the taxpayer is entitled to use as his basis the fair market value of the property at the time it was delivered to him on September 1, 1928, relying upon the authority of Marjorie K. Campbell (1939) 39 B. T. A. No. 133 and cases therein cited. The Board held that the taxpayer acquired the personal property by the will of his father and not by specific bequest and that the third sentence of Section 113 (a) (5) of the Revenue Act of 1928 controls in determining the basis to be used in computing gain or loss.

The Board also held that the period of holding by the trustee should not be tacked on to the period that the property was held by the taxpayer for the purpose of determining whether it was a "capital asset" under the provisions of Section 101 (c) (8) of the Revenue Act of 1928, because the trustee was a different taxpayer and it had complete dominion and control over the property in question until the very moment it was delivered to the taxpayer on September 1, 1928, and that the taxpayer had

no dominion, control, or vested interest in the particular property until such date.

93 The Commissioner presents that the basis for gain or loss of the property received from the testamentary trust in the hands of the taxpayer is cost of the property to the trustees as provided by Section 113 (a) of the Revenue Act of 1928.

The Commissioner further presents that the property involved in the sale on June 10, 1930, represents property consisting of 10,320 shares of stock of the Marine Union Investor's, Inc., "held by the taxpayer for more than two years" as such phrase is used in Section 101 (c) (8) of the Revenue Act of 1928, and the gain on the disposition thereof should be computed at capital gain rates and that the gain or loss on the disposition of the remainder of said property consisting of 6,830 shares of stock of the same corporation held less than two years should be computed at ordinary rates. It is further presented that the Board's action on this question is in conflict with the principles underlying the action of the United States Supreme Court in the case of McFeely v. Commissioner (1935), 296 U. S. 102, in that if the property involved was "acquired * * * by will" as the Board held in connection therewith, it would follow that such property should be considered as "property held by the taxpayer" from the date of its acquisition by the trustees.

The questions presented are:

1. As to the securities purchased by the trustees with trust funds (subsequent to March 1, 1913), is the basis for determining gain or loss: (a) the cost to the trustees, or (b) the fair market value on the date of delivery by the trustees to the taxpayer?

2. For determining the period of holding by the taxpayer under Section 101 of the Revenue Act of 1928, is the period to

94 be computed: (a) from the date of purchase by the trustees as to the securities acquired with trust funds, or (b) the date of delivery by the trustees to the taxpayer?

3. Was the taxpayer's interest "vested" or "contingent" under the laws of New York?

III

ASSIGNMENTS OF ERRORS

That the Commissioner of Internal Revenue being aggrieved by the opinion and decision of the United States Board of Tax Appeals in these proceedings hereby petitions for a review of said opinion and decision by the United States Circuit Court of Appeals for the Second Circuit, and for the correction of the

manifest errors which therein occurred and intervened to his prejudice. The errors committed by the Board, which are relied upon by the Commissioner as the basis of this petition for review, are as follows:

The Board erred:

1. In holding and deciding that personal property delivered by trustees from the trust created by and in accordance with the will of taxpayer's father takes, as its basis for gain or loss in the hands of the taxpayer, its fair market value at the time of the delivery to the taxpayer by the trustees—regardless of whether the property was purchased by the trustees.

2. In failing to hold and decide, where personal property is purchased or acquired by testamentary trustees of a trust created by and in accordance with the will of taxpayer's father and said property is physically delivered to said taxpayer on
95 September 1, 1928, by the trustees, that the cost basis of said property for gain or loss in the hands of the taxpayer is the same as the cost basis to the testamentary trustees.

3. In holding and deciding that the basis for determining gain or loss of the personal property delivered by trustees from the trust created by and in accordance with the will of taxpayer's father is determined and governed by the third line of Section 113 (a) (5) of the Revenue Act of 1932.

4. In failing to hold and to decide that the basis for determining gain or loss of the personal property delivered by trustees from the trust created by and in accordance with the will of taxpayer's father is determined and governed by the first sentence of Section 113 (a) of the Revenue Act of 1928, where said property delivered by the trustees was acquired by the trustees.

5. In holding and deciding that the "time of distribution to the taxpayer" within the meaning of Section 113 (a) (5) of the Revenue Act of 1928 is the date the trustees delivered the property as provided in the will to the taxpayer, to wit, September 1, 1928.

6. In failing to hold and decide that the taxpayer realized gains and sustained losses on the disposition of the personal property physically received from the trustees on September 1, 1928, measured by the difference between the sales prices and bases claimed by the Commissioner on the respective properties disposed of in 1930.

7. In that the decision of the Board is contrary to the position of the Commissioner outlined in General Counsel's Memorandum 14893 (1935), C. B. XIV–1, p. 202.

96 8. In holding and deciding that the property received by the taxpayer from the trust on September 1, 1928, was

"held" within the meaning of Section 101 (c) (8) of the Revenue Act of 1928 by the taxpayer only from the date he physically received said property from the trustees.

9. In failing to hold and decide that the property received by the taxpayer from the trust on September 1, 1928, was "held" within the meaning of Section 101 (c) (8) of the Revenue Act of 1928 by the taxpayer from the date said property was purchased by the trustees.

10. In holding and deciding that the period of holding by the trustees should not be tacked on to the period that the securities were held by the taxpayer for the purpose of determining whether they were capital assets under the provisions of Section 101 (c) (8) of the Revenue Act of 1928.

11. In failing to hold and decide that the period of holding by the trustees should be tacked on the period that the securities were held by the taxpayer for the purpose of determining whether they were capital assets under the provisions of Section 101 (c) (8) of the Revenue Act of 1928.

12. In holding and deciding that 10,320 shares of Marine Union Investor's, Inc., stock sold on June 10, 1930, were not capital assets within the meaning of Section 101 (c) (8) of the Revenue Act of 1928.

13. In failing to hold and decide that 10,320 shares of Marine Union Investor's, Inc., stock sold on June 10, 1930, were capital assets within the meaning of Section 101 (c) (8) of the Revenue Act of 1928.

97 14. In holding and determining that the taxpayer sustained an ordinary loss in the amount of $186,375.08 on the sale on June 10, 1930, or 17,150 shares of stock of the Marine Union Investor's Inc., received in a non-taxable exchange for stock of the Marine Share Corporation purchased by the trustees of the testamentary trust and delivered to taxpayer on September 1, 1928, measured by the difference between the fair market value of the stock in the amount of $473,768.75 on the date received and the sales price of $287,193.67.

15. In failing to hold and determine that the taxpayer realized a capital gain of $79,293.38 on the sale on June 10, 1930, of 10,320 shares of stock of the Marine Union Investor's Inc., received in a non-taxable exchange for stock of the Marine Share Corporation purchased by the trustees of the testamentary trust and physically delivered to the taxpayer on September 1, 1928, measured by the difference between the cost of the shares to the trustees on August 31, 1927, and the sales price, and sustained an ordinary loss of $13,687.41 on 6,830 shares of stock of the Marine Union Investor's Inc., received in a non-taxable exchange for

stock of the Marine Share Corporation purchased by the trustees of the testamentary trust and physically delivered to the taxpayer on September 1, 1928, measured by the difference between the cost of the shares to the trustees on August 30, 1928, and the sales price.

16. In that its decision is contrary and in conflict with the principles underlying the action of the United States Supreme Court in the case of McFeely v. Commissioner (1935) 296 U. S. 102.

17. In that its conclusions of law are contrary to and in conflict with its findings of fact.

98 18. In finding and determining that there is only a deficiency in tax liability due from the taxpayer for the year 1930 in the amount of $42,842.24.

19. In failing to find and determine that there is a deficiency in tax liability due from the taxpayer for the year 1930 in the amount of $87,284.56.

Wherefore, the Commissioner petitions that said findings of fact and opinion and decision of the United States Board of Tax Appeals be reviewed by the Circuit Court of Appeals for the Second Circuit; that a transcript of the record be prepared in accordance with the law and the rules of said court and be transmitted to the Clerk of said court for filing and that appropriate action be taken to the end that the errors herein complained of may be reviewed and corrected by said court.

(Sgd.) SAMUEL O. CLARK, JR.,
Assistant Attorney General.

(Sgd.) J. P. WENCHEL
R. L. W.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
CLAUDE R. MARSHALL,
Special Attorney,
Bureau of Internal Revenue.

99 UNITED STATES OF AMERICA,
District of Columbia, ss.:

Claude R. Marshall, being duly sworn, says that he is a Special Attorney in the Bureau of Internal Revenue and as such is duly authorized to verify the foregoing petition for review; that he has read said petition and is familiar with the contents thereof; that said petition is true of his own knowledge except as to the

matters therein alleged on information and belief, and as to those matters he believes it to be true.

(Sgd.) CLAUDE R. MARSHALL.
Claude R. Marshall.

Sworn and subscribed to before me this 20th day of September 1939.

(Sgd.) GEORGE W. KREIS,
Notary Public.

My commission expires Nov. 15, 1942.

100 In United States Circuit Court of Appeals for the Second Circuit

BTA Docket No. 77827

[Same title.]

Notice of filing petition for review

Filed Sept. 30, 1939

To Mr. SEYMOUR H. KNOX,
2100 Rand Building, Buffalo, New York.

You are hereby notified that the Commissioner of Internal Revenue did, on the 22nd day of September 1939, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 22nd day of September 1939.

(Sgd.) J. P. WENCHEL,
R. L. W.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

101 Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 26th day of September 1939.

(Sgd.) SEYMOUR H. KNOX,
Attorney for Respondent on Review.

CRM/csl.
9/13/39.

102 In United States Circuit Court of Appeals for the Second Circuit

[Same title.] BTA Docket No. 77827

Notice of filing petition for review

Filed Sept. 30, 1939

To JOHN L. KENEFICK, Esq.,
1330 Marine Trust Building, Buffalo, New York:

You are hereby notified that the Commissioner of Internal Revenue did, on the 22d day of September 1939, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 22d day of September 1939.

(Sgd.) J. P. WENCHEL,
R. L. W.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

103 Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 25th day of September 1939.

(Sgd.) JOHN L. KENEFICK,
Attorney for Respondent on Review.

CRM/csl.
9/13/39.

104 In United States Circuit Court of Appeals for the Second Circuit

BTA Docket No. 77827

[Same title.]

Notice of filing petition for review

Filed Sept. 30, 1939

To RALPH M. ANDREWS, Esq.,
1330 Marine Trust Building, Buffalo, New York.

You are hereby notified that the Commissioner of Internal Revenue did, on the 22 day of September 1939, file with the Clerk

of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 22 day of September 1939.

(Sgd.) J. P. WENCHELL,
R. L. W.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

105 Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 25 day of September 1939.

(Sgd.) RALPH M. ANDREWS,
Attorney for Respondent on Review.

CRM/csl.
9/13/39.

106 In United States Circuit Court of Appeals for the Second Circuit

BTA Docket No. 77827

[Same title.]

Notice of filing petition for review

Filed Sept. 30, 1939

To ERNEST J. BROWN, Esq.,
1330 Marine Trust Building, Buffalo, New York.

You are hereby notified that the Commissioner of Internal Revenue did, on the 22 day of September 1939, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 22 day of September 1939.

(Sgd.) J. P. WENCHEL,
R. L. W.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 25th day of September 1939.

(Sgd.) ERNEST J. BROWN,
Attorney for Respondent on Review.

CRM/csl.
9/13/39.

In United States Circuit Court of Appeals for the Second Circuit

BTA Docket No. 77827

[Same title.]

Amended praecipe for record

Filed Oct. 21, 1939

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit, and deliver to the Clerk of the United States Circuit Court of Appeals for the Second Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Second Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.
2. Pleadings before the Board:
(a) Petition, including annexed copy of deficiency letter.
(b) Answer.
(c) Amended answer.
(d) Reply to amended answer.
(e) Amendment to amended answer.
(f) Reply to Answer to Amendments of Petition.
3. Stipulation of Facts and Exhibit A attached thereto.
4. Respondent's Exhibit A (Decree).
5. Memorandum opinion of the Board.
6. Decision.
7. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.
8. Orders enlarging time for the preparation of the evidence and for the transmission and delivery of the record.
9. This praecipe (amended).

Said transcript to be prepared, certified and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Second Circuit.

(Sgd.) J. P. WENCHEL,
R. L. W.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Receipt of a copy of the above-described amended praecipe for record is acknowledged and agreed to this — day of October 1939.

(Sgd.) JOHN L. KENEFICK,
Attorney for Respondent on Review.

CRM/esl 10/17/39.

(Sgd.) RALPH M. ANDREWS,
(Sgd.) ERNEST J. BROWN,
Attorneys for Respondent on Review.

110 [Clerk's certificate to foregoing transcript omitted in printing.]

111 In United States Circuit Court of Appeals For the Second Circuit

Nos. 41-257-258-259—October Term, 1939

(Argued February 15, 1940. Decided June 10, 1940)

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

RICHARD VAN NEST GAMBRILL, RESPONDENT

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

MARJORIE K. CAMPBELL, RESPONDENT

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

SEYMOUR H. KNOX, RESPONDENT

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

DOROTHY K. G. ROGERS, RESPONDENT

112 Petitions by the Commissioner of Internal Revenue to review determinations of the United States Board of Tax

Appeals in respect to income taxes of the respondents Gambrill and Knox for the year 1930, and of the respondents Campbell and Rogers for the year 1933. Affirmed.

Before SWAN, AUGUSTUS N. HAND, and PATTERSON, Circuit Judges.

Sewall Key, Acting Assistant Attorney General, J. L. Monarch and Newton K. Fox, Special Assistants to the Attorney General, Counsel for the Commissioner of Internal Revenue in the proceeding against the respondent Gambrill. Samuel O. Clark, Assistant Attorney General, Sewall Key and Arthur A. Armstrong, Special Assistants to the Attorney General, Counsel for the Commisssioner of Internal Revenue in the proceedings against the respondents Campbell, Knox and Rogers. Sidney W. Davidson, Ben R. Clark, and Allin H. Pierce, Counsel for the respondent Gambrill. James McCormick Mitchell, John L. Kenefick, and Ralph M. Andrews, Counsel for the respondents Campbell, Knox and Rogers.

Opinion

113 AUGUSTUS N. HAND, *Circuit Judge:*

The foregoing proceedings all involve the correctness of income tax assessments by the Commissioner of Internal Revenue, and in each the Commissioner has appealed from decisions of the Board of Tax Appeals modifying his assessments.

In the Gambrill case the Commissioner assessed an income tax deficiency of $11,753.40 for the year 1930, while the Board of Tax Appeals determined that there was an overpayment of $75.60 by the taxpayer. In the Knox case the Commissioner assessed a deficiency for the same year of $35,645.83, while the Board determined that there was a deficiency of $42,842 (arising, however, from adjustments not here in issue). In the Campbell case the Commissioner assessed an income tax deficiency of $86,937.47 for the year 1933, and in the Rogers case a deficiency of $65,549.60 for the same year. The Board found that there was no income tax deficiency on the part of either Campbell or Rogers. We think that its orders in all four proceedings should be affirmed.

In each of the above cases the taxpayer involved was given a remainder interest in a trust created by will. Certain personal securities that were a part of the corpus of the particular trust were delivered by the trustee to the taxpayer after the right to possession became fixed by the termination of the prior beneficial estate. Some of these securities were acquired by the testator during his lifetime, some of them were purchased by the executor after the testator's death before setting up the trust, and some were purchased by the trustee after the trust was established.

Securities derived by the trustee in the various ways mentioned were delivered by him to the taxpayer and sold by the latter.

114 In assessing income taxes upon alleged profits realized by the taxpayer the Commissioner used the following bases for computing gains: In the case of securities which had been owned by the decedent, their fair market value at the time when distributed by the executor to the trustee; in the case of securities purchased by the executor or trustee, the cost to such fiduciary; in respect to certain securities purchased by a fiduciary prior to March 1, 1913, as in Gambrill's case, the value on that date, whenever cost was unknown. The Board of Tax Appeals, however, took the view that, because of the provisions of Section 113 (a) (5) of the Revenue Acts of 1928 and 1932, the proper basis in all cases was the fair market value of the securities at the "time of the distribution to the taxpayer" by the trustee, no matter when or how the trustee or the executor might have derived the particular securities.

In determining how long a taxpayer had held securities for the purpose of computing capital gain or loss under Section 101 of the Revenue Act of 1928, the Board used the dates of delivery of the securities by the trustee to the taxpayer. The Commissioner, on the other hand, used the date of the death of the testator as the beginning of the period of holding securities owned by the latter and the date of purchase by the fiduciary as the beginning in cases where securities were purchased by the executor or trustee.

We agree with the conclusion of the Board that Sections 113 (a) (5) of the Revenue Acts of 1928 and 1932 govern the computation of loss or gain in the cases before us. The pertinent provisions read as follows:

"(a) Property acquired after February 28, 1913.—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * *

115 "(5) Property Transmitted at Death.—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the

fair market value of the property at the time of the distribution to the taxpayer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death; * * *"

None of the securities involved in the cases before us were acquired "by specific bequest" or were "acquired by the decedent's estate from the decedent." They were all directly acquired from testamentary trustees. Accordingly the basis was not "the fair market value of the property at the time of the death of the decedent." Therefore the third clause of Section 113 (a) (5) which embraces "all other cases" of property acquired by will is controlling. That clause provides that: "In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer."

116 The words "the property" in the foregoing sentence seem inevitably to relate to the particular property sold by the taxpayer to whom it was distributed by the trustee. The term "taxpayer" is defined by Section 701 (a) (13) of the Revenue Acts of 1928 and 1932 as "any person subject to a tax imposed by this Act." It is hard to imagine language which would more clearly fix the basis for computing the gain or loss realized upon the sales of the securities with which the Commissioner had to deal than the words "fair market value of the property at the time of the distribution to the taxpayer."

Perhaps the most strenuous objection made by the Commissioner to adopting what seems to be the clear meaning of the statute is that increment in value between the date of the decedent's death and the time of distribution to the taxpayer is not subjected to taxation when the securities are sold and thus tax resources are impaired. But it is frequently true that increments are not subjected to taxation. One common case where increment in value is disregarded is that which occurs during the lifetime of an owner of securities which are not sold by him but are sold after his death by his executors, administrators, trustees, or remaindermen under his will. Such an increment accruing during the lifetime of the owner of securities has never been taken into account in computing gain or loss upon sales after his death. Increment between the date of death of the owner of securities and the date of distribution by an executor to a legatee is also to

be disregarded under the third clause of Section 113 (a) (5) in the case of distribution of securities which are transmitted by virtue of a general bequest.

The supposed loss in revenue due to a disregard of fluctuations in the market value of securities between the date of death
117 and the time of distribution is moreover somewhat fanciful, for in all cases where the property depreciates in value between the date of death and the date of distribution a larger tax would result from fixing the basic value at "the time of the distribution to the taxpayer" than from fixing the basis at the time of the testator's death.

The further contention of the Commissioner that the word "taxpayer" as used in the third clause of Section 113 (a) (5) should be construed as meaning the "trustee" and that the phrase "time of the distribution to the taxpayer" ought to be interpreted as meaning "the date when the executors transferred the property to the trustees," seems to us without warrant. The taxpayers here are undoubtedly the respondents. The trustees are separate entities and as such are neither agents of the respondents nor mere passive fiduciaries. It is true that under certain circumstances they might themselves have become taxpayers in respect to the corpus of their trusts, but only in case they had made sales of some of the securities composing the corpus—not, as here, when without making any sales they wound up their trusts and distributed the corpus to remaindermen. To treat the trustee and beneficiary-remaindermen, as the Commissioner wishes us to do, as a "sort of dual tax personality" is to disregard the plain language of the statute and to adopt a concept which seems to us to defy analysis. In view of the clear terms of the third clause of Section 113 (a) (5) it can make no difference whether the interests of any remaindermen be vested, vested subject to be divested, or contingent. In either event the basis should be "the fair market value at the time of the distribution to the taxpayer", i. e., to the respondent whose income taxes are being reviewed, and not to the trustee.

In respect to the securities purchased either by the executors or trustees the Commissioner says they do not come within the third clause of Section 113 (a) (5) because they were not acquired by will. This requires a most technical interpre-
118 tation of the clause and one that in our opinion is not sound even technically. Any property distributed by a trustee which is part of the corpus of the trust is acquired through and by virtue of the will. Through the will the remaindermen derived all their interests and without it they would have had no standing and would have received nothing. Lyeth v. Hoey, 305 U. S. 188, 194–195.

It is further argued that the Senate Report in respect to the enactment of Section 113 (a) (5) in the 1928 Act justified the Commissioner's interpretation of the statute. In dealing with the third clause the report said: "It would also apply in cases where the executor purchases property and distributes it to the beneficiary." There is, however, no reason because of this mention of purchases by the executor for limiting the application of the report to property so purchased. In cases where a trust has been created by will the executor will often act as trustee before the trust is actually set up and sometimes will sell and purchase securities on behalf of the trust. Indeed the statement in the Senate Report would not cover the particular facts before us except in situations where the executor so acted.

The Commissioner apparently contends that the decision in Brewster v. Gage, 280 U. S. 327, fixing the date of death as the time when property should be valued under the provisions of the Revenue Act of 1921, for the purposes of computing gain or loss, affords some guide in interpreting Section 113 (a) (5). The difficulty in maintaining such a contention is that Section 113 (a) (5) is specific, that it fixes a different date for valuing acquisitions of property from that of the Act of 1921, and that the opinion in Brewster v. Gage says at page 337: "The deliberate selection of language so different from that used in the earlier acts indicates that a change of law was intended."

In the United States v. Nostrand, 94 F. (2d) 510, and Commissioner v. Libbey, 100 F. (2d) 458, the Court of Appeals
119 of the First Circuit held that the basis for computing gain or loss to the taxpayer was the market value of the property at the time of distribution by the trustee to the remaindermen, and not the value at the time of distribution by the executor to the trustees. These decisions, rather than that of the Seventh Circuit in Commissioner v. Maguire rendered on March 5, 1940, are in accord with our view.

The second question is whether the securities passing to the respondents Gambrill and Knox were held by them for more than two years and hence whether any gain or loss realized by the sale was taxable not as ordinary income or loss but as a capital gain or loss because the securities were "capital assets" as defined in Section 101 (c) (8) and (B) of the Revenue Act of 1928. The Board held that they were not, and they plainly were not unless the period during which they were held by the trustees can be added to the period between the date of distribution to the taxpayers and the date of sale. There cannot be any such tacking because the property, when held by the respective respondents, did not have "for the purpose of determining gain or loss

from a sale * * *, the same basis * * * in his hands as it would have in the hands" of the trustees.

On behalf of the Commissioner it is argued that the decision of the Supreme Court in McFeeley v. Commissioner, 296 U. S. 102, requires us to find that the securities had been held from the date of death and that they, therefore, were held for more than two years prior to sale. That decision, however, involved an estate where there was no trust. The court only decided that the general legatee held the securities which were transferred to him by the executor from the date of death. We agree with the Board that the intervening trusts broke the continuity so that the taxpayer only held the securities from the time they were distributed to him.

120 In the Campbell case certain Woolworth stock was purchased by the taxpayer prior to distribution to her by the trustee of other shares of the same kind. If she did not hold the shares she acquired under the will until they were distributed to her by the trustee, under the "first-in-first-out" rule, her own shares should be treated as sold prior to those which were delivered to her by the trustee. We agree with the Board that her own shares must be regarded as sold first. During the time that the title to the shares remained in the trustee the taxpayer had no control over their disposition and they were not acquired until she obtained them as her own. Helvering v. San Joaquin Fruit & Investment Co., 297 U. S. 496.

The orders of the Board of Tax Appeals are affirmed.

121 In United States Circuit Court of Appeals, Second Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER,

v.

SEYMOUR H. KNOX, RESPONDENT

Appeal from the United States Board of Tax Appeals

Judgment

Filed June 29, 1940

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

D. E. ROBERTS, *Clerk.*

122 [File endorsement omitted.]

123 [Clerk's certificate to foregoing transcript omitted in printing.]

124 Supreme Court of the United States

Order allowing certiorari

Filed November 12, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 475

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

DOROTHY K. G. ROGERS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 28, 1940
CERTIORARI GRANTED NOVEMBER 12, 1940

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 475

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

DOROTHY K. G. ROGERS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Proceedings before United States Board of Tax Appeals	1	1
Docket entries	1	1
Petition	4	2
Exhibit A—Notice of deficiency dated February 27, 1936, from Office of the Commissioner of Internal Revenue to Mrs. Dorothy K. G. Rogers	31	19
Answer	36	21
Reply	56	33
Amendments of petition	60	35
Answer to amendments of petition	69	40
Amended reply	75	44
Stipulation of facts	78	46
Exhibit A—Last will and testament of Seymour H. Knox dated May 12, 1915	118	68
Respondent's Exhibit A—Decree dated May 24, 1921—Surrogate's Court of Erie County	143	83
Memorandum opinion, Murdock, M	157	92
Decision	160	93
Petition for review and assignments of error	161	94
Notices of filing petition for review	175	102
Amended praecipe for record	183	105
Certificate of clerk [omitted in printing]	185	106
Proceedings in U. S. C. C. A., Second Circuit	186	106
Opinion, Hand, J	186	107
Judgment	196	113
Clerk's certificate [omitted in printing]	198	113
Order allowing certiorari	199	113

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Before United States Board of Tax Appeals

Docket No. 84640

DOROTHY K. G. ROGERS, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket entries

Appearances: For Taxpayer—Ralph M. Andrews, Esq.; Dwight Taylor, Esq.; John L. Kenefick, Esq.; Ernest J. Brown, Esq. For Comm'r—B. M. Brodsky, Esq.; W. H. Schwatka, Esq.; E. L. Updike, Esq.

1936

May 25—Petition received and filed. Taxpayer notified. (Fee paid.)

May 25—Copy of petition served on General Counsel.

July 24—Answer filed by General Counsel.

July 31—Copy of answer served on taxpayer.

Sept. 5—Reply to answer filed by taxpayer. 9/8/36 copy served.

2 1937

July 20—Motion for circuit hearing at Buffalo, N. Y. Filed by General Counsel.

July 23—Hearing set August 18, 1937, on motion.

Aug. 18—Hearing had before Mr. Mellott on motion of respondent to consolidate dockets 61658, 62811, 63186, 63245, 51, 64523, 64908, 10 to 15, 24, 65011, 24, 65202, 65393, 71815, 16, 77824, 27 & 28, 84639, 40 & 41 and to deny his own motion for circuit hearing—granted. Motion filed at hearing.

Aug. 26—Hearing set Nov. 1, 1937.

Sept. 4—Notice of the appearance of Dwight Taylor as counsel for taxpayer filed.

Sept. 4—Motion for continuance until after Jan. 1, 1938, filed by taxpayer. 9/7/37 granted to Spring of 1938.

Dec. 14—Notice issued placing proceeding on Washington, D. C. Calendar.

1938

Oct. 7—Hearing set Dec. 5, 1938.

Nov. 28—Motion for a continuance to Dec. 14, 1938, or a date early in January 1939 filed by taxpayer. 11/30/38 granted to 12/14/38.

Dec. 13—Motion for leave to file amendment to petition, amendment to petition lodged by taxpayer.
Dec. 13—Copy of motion and amendments served on General Counsel.
Dec. 14—Hearing had before Mr. Murdock on merits. Submitted. On motion of respondent to file amended answer—granted. Motion of petitioner to file amended reply—granted. Motion and amendment to amended answer filed. Motion and amended reply filed. Stipulation of facts filed. Appearance of John L. Kenefick and Ernest J. Brown filed.
Dec. 28—Transcript of hearing of Dec. 14, 1938, filed.

3 1939

Jan. 12—Brief filed by taxpayer. 1/12/39 copy served.
Feb. 11—Brief filed by General Counsel.
Feb. 27—Reply brief filed by taxpayer. 3/11/39 copy served.
Mar. 21—Stipulation to correct transcript filed.
May 19—Memorandum opinion rendered, Mr. Murdock, Div. 3. Decision will be entered under Rule 50.
June 13—Computation of deficiency filed by General Counsel.
June 15—Hearing set July 5, 1939, on settlement.
June 23—Consent to settlement filed by taxpayer.
June 30—Decision entered, J. E. Murdock. Div. 3.
Sept. 22—Petition for review by U. S. Circuit Court of Appeals (2) with assignments of error filed by General Counsel.
Sept. 30—Proof of service filed by General Counsel. 3 for attorneys and 1 for taxpayer.
Oct. 10—Praecipe for record filed.
Oct. 20—Proof of service of filing praecipe filed by General Counsel. 3 for attorneys.
Oct. 21—Agreed amended praecipe for record filed with proof of service thereon.

4 Before United States Board of Tax Appeals

Docket No. 84640

[Same title.]

Petition

Filed May 25, 1936

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency dated February 27,

1936 (IT:AR:A–2 MEW–90D), and as a basis of her proceeding alleges as follows:

1. At all the times hereinafter mentioned petitioner was a resident of the County of Erie and State of New York.

2. The notice of deficiency (a copy of which is attached hereto marked "Exhibit A") was mailed to the petitioner on February 27, 1936.

3. The tax in controversy is an income tax for the calendar year 1933, and amounts to the sum of $65,549.60.

4. The determination of tax set forth in said deficiency letter is based upon the following errors:

I

The determination by the Commissioner of Internal Revenue that a dividend of $672.00 received by petitioner from the Great Southern Lumber Company was taxable to petitioner to the extent of 83.6544% thereof.

II

The determination by the Commissioner of Internal Revenue that, for the purpose of determining gain or loss, petitioner's cost basis on the sale during the calendar year 1933 of certain shares of the common stock of American Telephone & Telegraph Company and of certain corporate stock of the City of New York issued for water supply purposes (4¼'s of 1972), and of certain bonds of the County of Westchester (4¼'s of 1950 and 4¼'s of 1959) which petitioner had acquired from her father's testamentary trustees, and which had theretofore been purchased by said trustees, was the cost of said securities to said trustees.

III

The determination by the Commissioner of Internal Revenue that, for the purpose of determining gain or loss, petitioner's cost basis on the sale during the calendar year 1933 of certain shares of the capital stock of The Atchison, Topeka & Santa Fe Railway Company, which petitioner had acquired from her father's testamentary trustees, was as follows:

i. As to so much thereof as was purchased by her father prior to his death, the fair market value of said securities on the date of their distribution by her father's executors to her father's testamentary trustees.

ii. As to so much thereof as was purchased by her father's testamentary trustees, the cost thereof to said trustees.

6

IV

The determination by the Commissioner of Internal Revenue that, for the purpose of determining gain or loss, petitioner's cost basis on the sale during the calendar year 1933 of certain shares of the common capital stock of United States Steel Corporation and of certain corporate stock of the City of New York issued for water supply purposes (4¼'s of 1960), which petitioner had acquired from her father's testamentary trustees, and which had been purchased by her father prior to his death, was the fair market value of said securities on the date of the distribution thereof by her father's executors to her father's testamentary trustees.

V

The determination by the Commissioner of Internal Revenue that, for the purpose of determining gain or loss petitioner's cost basis on the sale during the calendar year 1933 of certain bonds of the City of Philadelphia (4's of 1946) and on the maturity during the calendar year 1933 of certain bonds of the City of Rochester (4½'s of 1933), which petitioner had acquired from her father's testamentary trustees, and which had theretofore been purchased by her father's executors, was the fair market value of said securities on the date of the distribution thereof by her father's executors to her father's testamentary trustees.

VI

The determination by the Commissioner of Internal Revenue that, for the purpose of determining gain or loss, petitioner's cost basis on the sale during the calendar year 1933

7 of certain shares of the $25.00 par value preferred stock of Buffalo, Niagara & Eastern Power Corporation, which petitioner had acquired from her father's testamentary trustees, and of certain shares of the common stock and warrants of Niagara Hudson Power Corporation which were derived from stock which petitioner had acquired from her father's testamentary trustees, is as follows:

i. As to so much thereof as was purchased by her father's executors, the cost thereof to said executors.

ii. As to so much thereof as was purchased by her father's testamentary trustees, the cost thereof to said trustees.

VII

The determination by the Commissioner of Internal Revenue that on petitioner's sale during the calendar year 1933 of 8,500

shares of the capital stock of F. W. Woolworth Company, petitioner derived a capital gain of $269,771.67 instead of sustaining a capital loss of $245,895.00, as claimed by petitioner on her return, upon the grounds:

i. That petitioner's holdings on the date of the sale of said stock of F. W. Woolworth Company had lost its identity, was incapable of identification, and, therefore, that the "first-in—first-out" rule should be applied; that in applying the "first-in—first-out" rule, the stock sold by her in 1933 must be deemed to have been sold out of lots acquired by her on August 26, 1924, from her father's testamentary trustees; and

8 ii. That petitioner's cost basis in the F. W. Woolworth Company stock distributed to her by her father's testamentary trustees, and which had theretofore been purchased by her father prior to his death, is the fair market value of said stock on July 1, 1921, the date of the distribution thereof by her father's executors to her father's testamentary trustees.

5. The facts upon which petitioner relies as the basis of this proceeding are as follows:

I

(a) On July 1, 1933, and for some time prior thereto petitioner was the owner of 224 shares of the capital stock of Great Southern Lumber Company, a Pennsylvania corporation with its principal office in the City of Harrisburg, Pennsylvania.

(b) Said Great Southern Lumber Company, in the year 1933, and for many years prior thereto, was the owner of a large quantity of long leaf yellow pine timber situated in the northern part of the State of Louisiana, and owned and operated a sawmill in the City of Bogalusa, Louisiana. In the year 1933 the corporation's land, to a very large extent, had been cut over and stripped of its stand, and in that year the corporation was approaching the end of its timber operation. During said year and for several years prior thereto the corporation had taken steps toward gradual liquidation.

(c) Prior to January 21, 1933, the Great Southern Lumber Company had an authorized issue of capital stock consisting of 160,000 shares of the par value of $80.00 each, all of which said shares were common stock and amounted in the aggregate to $12,800,000.00.

9 (d) At a meeting of the board of directors of the Great Southern Lumber Company held January 21, 1933, a meeting of the stockholders of said corporation was called to be held on April 26, 1933, for the purpose of voting upon a proposition for a reduction of the capital stock of said corporation from

$12,800,000.00 to $12,320,000.00, to be effected by a reduction of the par value of the corporation's shares from $80.00 to $77.00 per share. Said meeting of the stockholders was duly held on April 26, 1933, and the following resolutions were duly adopted:

"Resolved, That the capital of Great Southern Lumber Company be authorized to be reduced from $12,800,000.00 to $12,320,000.00, the same to be effected by a reduction in the par value of shares;

"Resolved, That the actual reduction in the said corporation's capital stock shall be made by its Board of Directors at such time as the said Board, in its discretion, shall determine."

* * * * * *

"Resolved, That the par value of shares of capital stock of Great Southern Lumber Company be, and the same are, hereby authorized to be reduced from $80.00 per share to $77.00 per share, so that the capital stock of the company thereafter shall consist of 160,000 shares with a par value of $77.00, aggregating, at par, $12,320,000.00;

"Resolved, That the actual reduction in the par value of said shares of said corporation shall be made by its Board of Directors at such time as the said board, in its discretion, shall determine."

(e) The Judges' Returns of Election to reduce the capital stock and to change the par value of the corporation's shares were thereafter duly filed in the office of the Secretary of the Commonwealth of Pennsylvania.

(f) At a meeting of the board of directors of said Great Southern Lumber Company held on June 27, 1933, the following resolution was duly adopted:

"Resolved: That the capital stock of this Company be, and the same is hereby, actually reduced from $12,800,000.00 to $12,320,000.00;

"Resolved: That the par value of shares of capital stock of this company be, and the same is hereby reduced from $80.00 share to $77.00 per share."

(g) Thereafter, and in accordance with statutory proceedings for the reduction of capital stock and the reduction of par value of its shares, and as required by the laws of Pennsylvania, said Great Southern Lumber Company duly paid to its stockholders of record the sum of $3.00 per share, charging said distribution to its capital stock account, and reducing its authorized and outstanding issue of capital stock accordingly. The par value of each certificate of outstanding capital stock of the corporation was changed from $80.00 per share to $77.00 per share.

(h) Petitioner duly deposited certificates representing said 224 shares of the capital stock of said Great Southern Lumber Company, and on July 1, 1933, a partial liquidating dividend of $672.00 was duly paid to petitioner.

(i) Thereupon there was returned to petitioner certifi-
11 cates representing 224 shares, having a par value of $77.00 per share. Petitioner credited the entire amount of said distribution to her personal capital account.

(j) The amount distributed by said Great Southern Lumber Company to petitioner, as aforesaid, was less than the fair market value of said stock on August 26, 1924, the date on which said stock was distributed to petitioner by her father's testamentary trustees, and was less than the fair market value of said stock on July 1, 1921, the date on which said stock was distributed by her father's executors to his testamentary trustees, as adjusted on account of intervening distributions from capital, and petitioner did not include any part of the amount so received in her taxable net income for the year 1933.

(k) The Commissioner of Internal Revenue, in his final determination, has included in petitioner's taxable net income an amount of $562.16 of the total distribution of $672.00 from said Great Southern Lumber Company, above described, upon the ground that 83.6544% of said distribution to petitioner was taxable to her.

II

(1) Petitioner's father, Seymour H. Knox, died on May 16, 1915, leaving a last will and testament, by the provisions of which the testator, after directing payment of his debts and the making of certain specific bequests, provided, in part, as follows, with respect to the disposition of his residuary estate:

"(B) Twenty (20) percent of all the rest, residue and remain-
der of my said estate (not including, however, the shares
12 of the capital stock of the six corporations mentioned in the first paragraph of this Article Twenty-first) I give, devise, and bequeath to my brother Henry D. Knox and Walter P. Cooke, both of the City of Buffalo, in trust nevertheless, for the following uses and purposes, to wit:

"To receive, hold and, from time to time, invest and reinvest the same, and to collect the rents, income, issues and profits on the property from time to time constituting such trust fund and to pay over so much of the net income arising therefrom, as to my trustees shall seem wise and proper toward the support, maintenance and education of my daughter, Dorothy Knox, until she shall arrive at the age of twenty-one (21) years, and to accumu-

late the balance of the income during her minority for her benefit, and to pay over such accumulated income to her when she shall arrive at the age of twenty-one (21) years, and thereafter to pay over the entire net income to my said daughter, Dorothy Knox, until she shall arrive at the age of twenty-eight (28) years, at which time I give, devise, and bequeath to my said daughter, Dorothy Knox, one-half (½) of the property then constituting said trust fund and I direct my said executors to pay over to my daughter, Dorothy Knox, the net income on the remaining one-half (½) of said trust fund until she shall arrive at the age of thirty-five (35) years, at which time I give, devise, and bequeath the remaining part of said trust fund to my said daughter, Dorothy Knox, and to her heirs and assigns forever.

"In the event that my said daughter, Dorothy Knox, shall die before reaching the age of thirty-five (35) years, I give,
13 devise, and bequeath any part or portion of said trust fund, which has not then been paid over to her, or to the possession of which at the time of her death she was not entitled, unto the issue of said Dorothy Knox, if any, surviving her, to be divided among them, share and share alike. In case there be no issue her surviving, then I give, devise, and bequeath said trust fund unto her heirs."

(m) Pursuant to authority vested in them by the provisions of petitioner's father's will quoted above in paragraph II (l), said testamentary trustees bought the following securities on or about the dates and for the amounts hereinafter stated:

Date	Quantity	Security	Amount
Dec. 31, 1925	150 shares	American Telephone & Telegraph Company	$21,343.75
July 31, 1926	25 shares	do	2,568.75
July 31, 1928	29 shares	do	2,900.00
June 30, 1929	34 shares	do	5,673.92
July 30, 1930	34 shares	do	3,515.60
Jan. 31, 1926	$16,000.00 face amount	City of New York 4¼s of 1972	16,180.00
June 30, 1924	$25,000.00 face amount	County of Westchester 4¼s of 1950	25,768.75
June 30, 1924	$25,000.00 face amount	County of Westchester 4¼s of 1959	25,901.25

(n) On or about August 26, 1931, said testamentary trustees distributed to petitioner, among other things, the following securities which have been heretofore referred to, and which, on said date, had a fair market value as hereinafter stated:

14 Quantity	Security	Unit price	Value
272 shares	American Telephone & Telegraph Company	171.875	$46,750.00
$16,000.00 face amount	City of New York 4¼s of 1972	105.375	16,860.00
$25,000.00 face amount	County of Westchester 4¼s of 1950	108.72	27,180.00
$25,000.00 face amount	County of Westchester 4¼s of 1959	111.29	27,822.50

(o) During the calendar year 1933 petitioner duly sold the above described securities on the dates and in the amounts hereinafter stated:

Date	Quantity	Security	Sale price
Dec. 21, 1933	272 shares	American Telephone & Telegraph Company	$29,635.57
July 27, 1933	$16,000.00 face amount	City of New York 4¼s of 1972	12,900.00
Dec. 30, 1933	$25,000.00 face amount	County of Westchester 4¼s of 1950	19,341.48
Dec. 30, 1933	$25,000.00 face amount	County of Westchester 4¼s of 1959	17,968.75

(p) In her return for the calendar year 1933, which was filed with the Collector of Internal Revenue at Buffalo, New York, on or about March 15, 1934, petitioner reported capital losses on the sales of the above securities in the following amounts, and computed as follows:

15 Quantity	Security	Fair market value Aug. 26, 1931	Sale price	Capital loss
272 shares	American Telephone & Telegraph Company.	$46,750.00	$29,635.57	$17,114.43
$16,000.00 face amount	City of New York 4¼'s of 1972	16,860.00	12,900.00	3,960.00
$25,000.00 face amount	County of Westchester 4¼'s of 1950	27,180.00	19,341.48	7,838.52
$25,000.00 face amount	County of Westchester 4¼'s of 1959	27,822.50	17,968.75	9,853.75

(q) The Commissioner of Internal Revenue has reduced petitioner's cost basis in the above-described securities and has reduced the capital losses claimed by her on the sales thereof in the following amounts:

American Telephone & Telegraph Company	$10,747.98
City of New York 4¼'s of 1972	680.00
County of Westchester 4¼'s of 1950	1,411.25
County of Westchester 4¼'s of 1959	1,921.25

The Commissioner of Internal Revenue has made said reductions upon the ground that petitioner's cost bases in the above securities are the costs thereof to the testamentary trustees of her father's estate.

III

(r) On the date of the death of petitioner's father, May 16, 1915, the latter was the owner of 500 shares of the common capital stock of The Atchison, Topeka & Santa Fe Railway Company, which had a fair market value on that date of and was appraised at $49,625.

16 (s) Pursuant to the provisions of petitioner's father's will above quoted at paragraph II (l), 20% of said shares of stock of The Atchison, Topeka & Santa Fe Railway Company, or 100 shares, was distributed by the executors to the testamentary trustees for petitioner on July 1, 1921. Said stock had a fair market value on that date of $80.50 per share, or a total value of $8,050.

(t) Thereafter and on April 30, 1928, said testamentary trustees purchased 4 additional shares of said stock for $400.

(u) Upon petitioner's attaining the age of 35 years on August 26, 1931, said testamentary trustees distributed said 104 shares of stock of The Atchison, Topeka & Santa Fe Railway Company to petitioner. On that date said shares had a fair market value of $137.00 per share, or $14,248.00.

(v) On November 27, 1933, petitioner duly sold said 104 shares, receiving therefor $4,784.54.

(w) In her return for the calendar year 1933 petitioner claimed a capital loss of $9,463.46 on the sale of said 104 shares of stock of The Atchison, Topeka & Santa Fe Railway Company, being the difference between the fair market value of said shares at the date they were distributed to her by her father's testamentary trustees, and the sale price thereof.

(x) The Commissioner of Internal Revenue, in his final determination, has determined that the petitioner's loss on said sale was $3,665.46, being the difference between the fair market value of 100 of said shares on the date they were dis-
17 tributed to the testamentary trustees by the executors, plus the trustees' cost of the 4 shares purchased by them in 1928. and the sale price thereof.

IV

(y) On July, 1, 1921, the executors of petitioner's father's estate distributed to the testamentary trustees for petitioner, pursuant to the provisions of the will above quoted at paragraph II (l), 600 shares of the common capital stock of United States Steel Corporation, which, on that date, had a fair market value of $74.50 per share, or a total fair market value of $44,700.00 and $10,000.00 face amount of the corporate stock of the City of New York issued for water supply purposes (4¼'s of 1960) which the Commissioner has determined had a fair market value on said date of $10,075.00.

(z) Upon petitioner's attaining the age of 28 years on August 26, 1924, said testamentary trustees distributed to her said 600 shares of the common capital stock of United States Steel Cor-

poration which, on that date, had a fair market value of $108.875 per share, or a total value of $65,325.00.

(aa) Thereafter and on June 1, 1927, petitioner received a 40% stock dividend with respect to said 600 shares of the common capital stock of United States Steel Corporation, thereby increasing her holdings thereof to 840 shares.

(bb) Subsequently and on or about March 1, 1929, petitioner duly purchased an additional 160 shares of said stock, paying therefor $30,295.00 in cash.

(cc) On or about June 7, 1929, petitioner purchased an additional 142 shares of said common capital stock of
18 United States Steel Corporation, paying therefor $19,-880.00 in cash.

(dd) Upon petitioner's attaining the age of 35 years on August 26, 1931, said testamentary trustees distributed to her $10,000.00 face amount of the corporate stock of the City of New York issued for water supply purposes (4¼'s of 1960) which, on that date, had a fair market value of $10,468.75.

(ee) Thereafter and on or about November 27, 1933, petitioner duly sold all of said 1,142 shares of the common capital stock of said United States Steel Corporation for $48,899.67 in cash.

(ff) Thereafter and on or about December 27, 1933, petitioner duly sold said $10,000.00 face amount of the corporate stock of the City of New York issued for water supply purposes (4¼'s of 1960) for $8,037.50.

(gg) In her return for the calendar year 1933 petitioner reported a capital loss on the sale of said United States Steel Corporation stock of $66,600.33, being the difference between the fair market value of the 600 shares of said stock on August 26, 1924, the date on which they were distributed to petitioner by the testamentary trustees, plus the cost to her of 302 shares purchased by her, and the sale price thereof; and on the sale of said corporate stock of the City of New York of $2,431.25, the amount of said loss being the difference between the fair market value of said corporate stock on the date it was distributed to petitioner by the testamentary trustees, and the sale price thereof.

19 (hh) The Commissioner of Internal Revenue, in his final determination, has determined that petitioner's capital loss on the sale of said United States Steel Corporation stock was $45,975.33, and on the sale of said corporate stock of the City of New York was $2,037.50, upon the ground that the proper basis, for tax purposes, in computing petitioner's gain or loss, was the fair market value on July 1, 1921, of so much of said securi-

ties as was acquired by petitioner from her father's testamentary trustees, and which was distributed to said trustees by her father's executors on said July 1, 1921.

V

(ii) On July 1, 1921, the executors of the estate of petitioner's father distributed to the testamentary trustees for petitioner, pursuant to the provisions of the will above quoted at paragraph II (l), $50,000.00 face amount of the bonds of the City of Philadelphia, Pennsylvania (4's of 1946), and $20,000.00 face amount of the bonds of the City of Rochester, New York (4½'s of 1933). Upon information and belief, the Commissioner of Internal Revenue has determined the fair market value of said City of Philadelphia bonds on the date of said distribution to be $50,687.50, and of said City of Rochester bonds to be $20,082.50.

(jj) When petitioner attained the age of 28 years on August 26, 1924, said testamentary trustees distributed the above-described bonds of the City of Philadelphia to petitioner. On that date said bonds had a fair market value of $102.96 per $100.00, or a total value of $51,480.00.

(kk) When petitioner attained the age of 35 years on August 26, 1931, said testamentary trustees distributed said bonds of the City of Rochester to petitioner. On that date said bonds had a fair market value of $104.87 per $100.00, or a total value of $20,974.00.

(ll) On or about November 24, 1933, petitioner duly sold said bonds of the City of Philadelphia for $42,406.25.

(mm) On or about June 14, 1933, said City of Rochester bonds matured and petitioner received in cash on the maturity date thereof $20,000.00 in respect thereof.

(nn) In her return for the calendar year 1933 petitioner claimed a capital loss on the sale of the said City of Philadelphia bonds of $9,073.75, and on the maturity of said City of Rochester bonds a capital loss of $974.00, being the difference between the fair market value of said securities on the dates on which they were distributed to petitioner by the testamentary trustees, and the amounts received therefor by the petitioner during the calendar year 1933.

(oo) The Commissioner of Internal Revenue, in his final determination, has determined that petitioner's loss on the sale of said bonds of the City of Philadelphia was $8,281.25, and on the maturity of the said bonds of the City of Rochester was $82.50, being the difference between the fair market value of said securities on the date on which they were distributed by peti-

tioner's father's executors to his testamentary trustees, and the amounts received therefor by petitioner during the calendar year 1933.

VI

(pp) On June 15, 1925, the executors of the estate of petitioner's father distributed to the testamentary trustees for
21 petitioner, pursuant to the provisions of the will above quoted at paragraph II (l), 214 shares of the common capital stock of Niagara, Lockport & Ontario Power Company, which had theretofore cost said executors $4,537.06. Said 214 shares had a fair market value on said June 15, 1925, of $76.00 per share, or an aggregate value of $16,264.00.

(qq) Thereafter and on or about August 1, 1925, said testamentary trustees exchanged said 214 shares of Niagara, Lockport & Ontario Power Company common stock for 267½ shares of the preferred stock and 267½ shares of the common stock of Buffalo, Niagara & Eastern Power Corporation, said exchange being pursuant to a plan of reorganization to which both said Niagara, Lockport & Ontario Power Company and Buffalo, Niagara & Eastern Power Corporation were parties. On the date of said exchange the fair market value of said common stock of Buffalo, Niagara & Eastern Power Corporation was $42.375 per share and of the preferred stock of said corporation was $24.375 per share.

(rr) Thereafter and on August 31, 1925, said testamentary trustees purchased for $1,202.50, 32½ additional shares of the common stock of said Buffalo, Niagara & Eastern Power Corporation, bringing their total holdings of said common stock to 300 shares.

(ss) On the same date said testamentary trustees purchased 32½ shares of the $25.00 par value preferred stock of Buffalo, Niagara & Eastern Power Corporation, paying therefor $780.25.

(tt) Subsequently and on or about January 31, 1926, said
22 testamentary trustees purchased 75 shares of the Class A common stock of said Buffalo, Niagara & Eastern Power Corporation paying threefor $1,500.

(uu) On August 19, 1929, said testamentary trustees exchanged said 300 shares of common stock of Buffalo, Niagara & Eastern Power Corporation above referred to for 1,200 shares of the common capital stock of Niagara Hudson Power Corporation and 300 class A option warrants of said Niagara Hudson Power Corporation which warrants entitled the holder to purchase at any time on or before October 1, 1944, one share of the corporation's common stock at $35 per share for each warrant held.

(vv) On the same date, August 19, 1929, said testamentary trustees exchanged 75 shares of the Class A common stock of said Buffalo, Niagara & Eastern Power Corporation above referred to for 300 shares of the common capital stock of Niagara Hudson Power Corportion and 75 Class A option warrants of said Niagara Hudson Power Corporation which warrants entitled the holder to purchase at any time on or before October 1, 1944, one share of the corporation's common stock at $35 per share for each warrant held.

(ww) On said date, August 19, 1929, common stock of said Niagara Hudson Power Corporation had a fair market value of $26.8125 per share and the Class A option warrants had a fair market value on that date of $9.125 each. Said exchange was pursuant to a plan of reorganization to which both Buffalo, Niagara & Eastern Power Corporation and Niagara Hudson Power Corporation were parties.

23 (xx) Thereafter and on August 26, 1931, the date on which petitioner attained the age of thirty-five years, said testamentary trustees distributed to petitioner said 1,500 shares of common stock and 375 Class A option warrants of Niagara Hudson Power Corporation and 300 shares of $25 par value Buffalo, Niagara & Eastern Power Corporation preferred stock. On that date the Niagara Hudson Power Corporation common stock had a fair market value of $10.375, or a total fair market value of $15,562.50, the Class A option warrants of Niagara Hudson Power Corporation a fair market value of $1.75, or a total fair market value of $656.25, and the $25 par value preferred stock of Buffalo, Niagara & Eastern Power Corporation, a fair market value of $27 per share, or a total fair market value of $8,100.

(yy) Thereafter and on August 8, 1932, pursuant to corporate action taken by the corporation to reduce its capital stock from 45,000,000 shares of the par value of $10 each to 15,000,000 shares of a par value of $15 each, petitioner exchanged her 1,500 shares of old common stock of Niagara Hudson Power Corporation, having a par value of $10 each, for 500 new shares of common stock of said corporation having a par value of $15 each, reducing her holdings of such common stock to 500 shares. A corresponding reduction was accomplished in the number of outstanding Class A option warrants, by a similar exchange of one for three, petitioner's holdings thereof being reduced to 125 warrants.

(zz) Subsequently and on December 21, 1933, petitioner duly sold said 500 shares of the common stock of Niagara Hudson Power Corporation for $2,394.50, said 125 class A option

24 warrants of said corporation for $39.97, and said 300 shares

of the $25 par value preferred stock of Buffalo, Niagara & Eastern Power Corporation for $4,750.50.

(aaa) On her return for the calendar year 1933, petitioner reported capital losses on account of the sale of said securities, as follows:

500 shares Niagara Hudson common	$13,178.00
125 Niagara Hudson Class A Option Warrants	616.28
300 shares Buffalo, Niagara & Eastern Power Corporation-Preferred	3,349.50

said losses representing the difference between the fair market value of said securities on August 26, 1931, the date of distribution thereof to the petitioner by the testamentary trustees, and the sale price thereof.

(bbb) The Commissioner of Internal Revenue in his final determination has adjusted said capital losses to the following:

500 shares Niagara Hudson common stock (Loss)	$3,188.27
125 Niagara Hudson Class A Option Warrants (Gain)	39.97
300 shares Buffalo, Niagara & Eastern Power Corporation Preferred (Gain)	2,313.46

(ccc) In determining the adjusted loss on the Niagara Hudson common stock the Commissioner has used that part of the executors' cost of the 214 shares of Niagara, Lockport & Ontario
25 Power Company common stock, referred to above, which is allocable to the 267½ shares of the common stock of Buffalo, Niagara & Eastern Power Corporation received by the trustees on the exchange of August 1, 1925, plus the trustees' cost of the 32½ additional shares of common stock of Buffalo, Niagara & Eastern Power Corporation purchased by them on August 31, 1925, plus the trustees' cost of the 75 shares of Class A common stock of Buffalo, Niagara & Eastern Power Corporation purchased by them on January 31, 1928, or an aggregate adjusted cost basis of $5,582.77.

(ddd) The Commissioner has treated the entire proceeds of the sale of Class A option warrants as a capital gain.

(eee) In determining a gain on the sale of the preferred stock of Buffalo, Niagara & Eastern Power Corporation, the Commissioner has used as the cost basis that part of the executors' cost of the 214 shares of the common capital stock of Niagara, Lockport & Ontario Power Company which is allocable to the 267½ shares of preferred stock of Buffalo, Niagara & Eastern Power Corporation received by the trustees on the exchange of August 1, 1925, plus the cost to the trustees of the 32½ shares of Buffalo, Niagara & Eastern Power Corporation preferred stock purchased by them on August 31, 1925, or an aggregate adjusted cost basis of $2,437.04.

VII

(fff) On July 1, 1921, petitioner's father's executors distributed to the testamentary trustees for petitioner, in accordance with the terms of the will quoted above, 4,960 shares of the par value of $100.00 per share of the F. W. Woolworth Company which
26 on that date had a fair market value of $110.00 per share, or an aggregate fair market value of $545,600.00. Subsequently and on or about June 30, 1924, said trustees, pursuant to proper corporate action by which reduction in the par value of shares from $100.00 to $25.00 was accomplished, exchanged said 4,960 shares of $100.00 par value of F. W. Woolworth Company stock for 19,840 shares of $25.00 par value of stock of said company.

(ggg) Upon petitioner becoming 28 years of age on August 26, 1924, said trustees distributed to her 9,920 of said new shares which on that date had a fair market value of $113.875 per share, or a total fair market value of $1,129,640.

(hhh) Of the 9,920 shares retained by the trustees 400 were sold at a profit in 1925. In the same year the trustees purchased 480 additional shares at an aggregate cost of $92,500. On February 1, 1927, the corporation declared a 50% stock dividend, the trustees receiving thereon 5,000 shares bringing their total holdings to 15,000. On June 24, 1929, after proper corporate action further reducing the par value of the corporation's shares from $25 to $10 per share, the trustees exchanged said 15,000 shares of $25 par value for 37,500 new shares of $10 par value.

(iii) Upon petitioner attaining the age of 35 years on August 26, 1931, said trustees duly distributed to her said 37,500 shares of $10 par value of F. W. Woolworth Company stock which on that date had a fair market value of $68 per share, or a total fair market value of $2,550,000.

(jjj) On December 27, 1933, petitioner duly sold from the lot of 37,500 shares of $10 par value of F. W. Woolworth Company stock acquired by her from her testamentary trustees on August 26, 1931, 8,500 shares for $332,105.

27 (kkk) In her return for the calendar year 1933, petitioner claimed a capital loss on said sale of $245,895, being the difference between the fair market value of said shares on August 26, 1931, the date on which they were distributed to her by the testamentary trustees, and the sale price thereof.

(lll) The Commissioner of Internal Revenue has disallowed said capital loss and has determined a capital gain of $269,771.67 on the ground that as the result of the exchange on the basis of

2½ for 1 which occurred on June 24, 1929, the identity of petitioner's shares of F. W. Woolworth Company stock was lost; that the "first in-first out" rule must be applied; and, therefore, that the 8,500 shares sold on December 27, 1933, must be deemed to have been out of the lot of 9,920 shares of $25 par value (which subsequently became 37,200 shares of a par value of $10 per share) distributed to the petitioner by the testamentary trustees on August 26, 1924.

6. Wherefore, petitioner prays that this Board may hear the proceeding and determine that:

I

The distribution of Great Southern Lumber Company received by petitioner during the calendar year 1933 was a partial liquidating dividend of said Great Southern Lumber Company, properly chargeable to the corporation's capital stock account and was not a distribution of earnings or profits taxable to petitioner under the provisions of the Revenue Act of 1932.

II

For the purpose of determining gain or loss on petitioner's sale during the calendar year 1933 of certain shares of the
28 common stock of American Telephone and Telegraph Company, certain corporate stock of the City of New York (4¼'s of 1972) and certain bonds of the County of Westchester (4¼'s of 1950 and 4¼'s of 1959), petitioner's cost basis is the fair market value of said securities on August 26, 1931, the date on which they were distributed to petitioner by her father's testamentary trustees.

III

For the purpose of determining gain or loss on petitioner's sale during the calendar year 1933 of certain shares of the capital stock of The Atchison, Topeka and Sante Fe Railway Company, petitioner's cost basis is the fair market value of said securities on August 26, 1931, the date on which they were distributed to petitioner by her father's testamentary trustees.

IV

For the purpose of determining gain or loss on petitioner's sale during the calendar year 1933 of certain corporate stock of the City of New York (4¼'s of 1960) and certain shares of

the capital stock of United States Steel Corporation, petitioner's cost basis is the fair market value of said securities on August 26, 1931, and August 26, 1924, respectively, the dates on which said securities were distributed to petitioner by her father's testamentary trustees.

V

For the purpose of determining gain or loss on petitioner's sale during the calendar year 1933 on certain bonds of the
29 City of Philadelphia, Pennsylvania (4's of 1946) and of the City of Rochester, New York (4½'s of 1933), petitioner's cost basis is the fair market value of said bonds on August 26, 1924, the date on which said securities were distributed to petitioner by her father's testamentary trustees.

VI

For the purpose of determining gain or loss on petitioner's sale during the calendar year 1933 of certain shares of the common stock of Niagara Hudson Power Corporation, certain Class A option warrants of said corporation and certain shares of the $25 par value preferred stock of Buffalo, Niagara & Eastern Power Corporation, petitioner's cost basis is the fair market value of the said securities on August 26, 1931, the date on which said securities were distributed to petitioner by her father's testamentary trustees.

VII

On the sale during the calendar year 1933 of 8,500 shares of $10 par value stock of F. W. Woolworth Company, petitioner sustained a capital loss of $245,895, that said stock was sold out of the lot of 37,500 shares of $10 par value acquired by petitioner from her father's testamentary trustees on August 26, 1931, and that petitioner's cost basis in said stock is the fair market value thereof on said August 26, 1931, the date on which it was distributed to her by her father's testamentary trustees.

(S) RALPH M. ANDREWS,
Counsel for Petitioner,
Office and Post Office Address, 1330 Marine Trust Building,
239 Main Street, Buffalo, New York.

30 [*Duly sworn to by Dorothy K. G. Rogers; jurat omitted in printing.*]

31 *Exhibit A annexed to petition*

SN–A

TREASURY DEPARTMENT,
Washington, Feb. 27, 1936.

Office of Commissioner of Internal Revenue. Address Reply to Commissioner of Internal Revenue and Refer to—

Mrs. DOROTHY K. G. ROGERS,
706 Marine Trust Building, Buffalo, New York.

MADAM: You are advised that the determination of your income tax liability for the taxable year 1933 discloses a deficiency of $65,549.60 as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1932, as amended by section 501 of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the
32 attention of IT:C:P–7. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner.

By CHAS. T. RUSSELL,
Deputy Commissioner.

Enclosures:
Statement.
Form 870.

STATEMENT

IT:AR:A–2.
MEW–90D.

In re: Mrs. Dorothy K. G. Rogers,
706 Marine Trust Building,
Buffalo, New York.

Income Tax Liability

Year, 1933. Income Tax Liability, $65,549.60. Income Tax Assessed, None. Deficiency, $65,549.60.

33 The deficiency shown herein is based upon the report dated November 1, 1935, prepared by Revenue Agent H. E. Murray, a copy of which was transmitted to you under date of December 2, 1935.

A synopsis of your adjusted income tax liability follows:

Income shown on the return exclusive of capital net loss	$161,099.18
Add:	
1. Loss on sales decreased	98.00
2. Dividends increased	562.16
	$161,759.34
Less: 3. Contribution deduction	3,380.24
Adjusted income for surtax	$158,379.10
Less: Dividends	194,069.56
Balance subject to normal tax	-None
Surtax on $158,379.10	$50,565.76
Tax at 12½% on adjusted capital net gain of $120,002.70	15,000.34
Total tax	$65,566.10
34 Brought forward	$65,566.10
Less: Tax paid at source	16.50
Corrected income tax liability	$65,549.60
Income tax assessed, original, account #660359	None
Deficiency of tax	$65,549.60

Explanation of Changes

1. Income is increased and loss on sales decreased by eliminating the value of $98.00 on 28 Niagara Share warrants. Since the warrants were not exercised but allowed to lapse, no adjustment should be made on account thereof when the stock is sold.

2. Dividends have been increased by $562.16 which is 83.6544% of $672.00 received from the Great Southern Lumber Co., representing the taxable portion of the dividends distributed by the company in the year 1933.

3. Contribution deduction of $3,380.24 is allowed.

Capital net loss reported as $445,164.29 has been changed to a capital net gain of $120,002.70 or a net increase of $565,166.99 due mainly to adjustments to the cost basis used or applicable to the securities sold.

It is noted that in the sale of the securities, which you received from the Dorothy Knox Trust, you used the values as at August 26, 1924, or August 26, 1931, the dates the trustee transferred the stocks to you.

35 The Bureau has used the fair market values as at July 1, 1921, for the securities transferred to the trustees when the trust was set up or the actual costs to the trustee of stocks purchased by him. The trust was created under the will of Seymour H. Knox, who died on May 16, 1915.

Section 113 (a) (5) of the Revenue Act of 1932 provides that the cost basis of property acquired by general bequest shall be its fair market value at the time of distribution to the beneficiary.

The date of distribution is held to be July 1, 1921, the date the securities were transferred by the executor of the estate to the trustee. Under General Counsel Memorandum 14893 (Internal Revenue Bulletin XIV No. 21, page 11), on July 1, 1921, you actually entered into possession of the income of the property and later to the possession of the property of its equivalent.

An analysis of your account with the Woolworth stock shows that through the 2½-for-1 exchange in 1929, the identity of your various holdings in this stock was lost. Therefore, in accordance with article 600 (4) of Regulations 77, the 8,500 shares sold in 1933 have been held to have come from the earliest acquisitions of the stock. This adjustment, which comprises the greater portion of the increase of $565,166.99, is as follows:

8,500 shares value at August 26, 1931, used by you	$578,000.00
Value at July 1, 1921, of 566⅔ shares at 100 (represented by the 8,500 shares sold)	62,333.33
Cost overstated	$515,666.67

In compliance with your letter of February 4, 1936, this final notice of deficiency is now being forwarded.

36 Before United States Board of Tax Appeals

Docket No. 84640

[Same title.]

Answer

Filed July 24, 1936

The Commissioner of Internal Revenue by his attorney, Herman Oliphant, General Counsel for the Department of the Treasury, for answer to the petition filed in the above-entitled appeal, admits, denies, and avers as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the tax in controversy is an income tax for the calendar year 1933 and that the Commissioner determined a deficiency amounting to $65,549.60. Denies that the entire amount thereof is in controversy.

4. I. Admits that the Commissioner determined that a dividend of $672.00 received by petitioner from the Great Southern Lumber Company is taxable to the petitioner to the extent of 83.6544% thereof. Denies that the Commissioner thereby erred.

II. Admits that the Commissioner determined that petitioner's basis for determining gain or loss on the sale during 1933 of certain shares of common stock of American Telephone and
37 Telegraph Company, certain bonds of the City of New York (4¼'s of 1972), and certain bonds of the County of Westchester was the cost of said securities to the trustees of a testamentary trust of which petitioner was the sole beneficiary. Denies that the Commissioner thereby erred.

III. Admits that the Commissioner determined that the petitioner's basis for determining gain or loss on the sale during 1933 of certain shares of stock of The Atchison, Topeka & Santa Fe Railway Company was as follows: As to the shares owned by petitioner's father on the date of his death, the fair market value thereof on the date of their distribution by her father's executors; and as to the shares acquired by the trustees of said testamentary trust, the cost thereof to the trustees. Denies that the Commissioner thereby erred.

IV. Admits that the Commissioner determined that petitioner's basis for determining gain or loss on the sale during 1933 of certain shares of the common stock of United States Steel Corporation, and certain bonds of the City of New York (4¼'s of 1960) was the fair market value thereof on the date said securities were distributed by the executors of her father's estate. Denies that the Commissioner thereby erred against the petitioner, and avers that the Commissioner erred in favor of the petitioner by overvaluing the aforesaid bonds of the City of New York.

V. Admits that the Commissioner determined that petitioner's basis for determining gain or loss on the sale during 1933 of certain bonds of the City of Philadelphia (4's of 1946), and on the maturity during 1933 of certain bonds of the City of Rochester (4½'s of 1933) was the fair market value thereof on the date said securities were distributed by
38 the executors of her father's estate. Denies that the Commissioner thereby erred.

VI. Denies all allegations contained in subparagraph VI of paragraph 4 of the petition.

VII. Admits that the Commissioner determined that on the sale during the calendar year 1933 of 8,500 shares of F. W. Woolworth Company petitioner derived a capital gain of $269,771.67, instead of sustaining a capital loss of $245,895.00 as

claimed by petitioner on her return; that the Commissioner determined that the shares sold were derived from stock distributed on July 1, 1921 by the executors of her father's estate; and that the Commissioner determined that petitioner's basis for the stock sold was the fair market value on July 1, 1921 of the shares from which the 8,500 shares were so derived. Denies that the Commissioner thereby erred, and denies all other allegations contained in subparagraph VII of paragraph 4 of the petition.

5. I (a). Admits that on July 1, 1933, and for some time prior thereto petitioner was the owner of 224 shares of the capital stock of Great Southern Lumber Company. Denies all other allegations contained in subparagraph I (a) of paragraph 5 of the petition.

I (b). Admits that Great Southern Lumber Company in the year 1933 and for many years prior thereto, was the owner of a large quantity of long leaf yellow pine timber situated in the northern part of the state of Louisiana, and owned and operated a sawmill in the city of Bogalusa, Louisiana. Denies all other allegations contained in subparagraph I (b) of paragraph 5 of the petition.

39 I (c), (d), (e), and (f). Denies all the allegations contained in subparagraphs I (c), (d), (e), and (f) of paragraph 5 of the petition.

I (g). Admits that on or about July 1, 1933, Great Southern Lumber Company paid $672.00 to the petitioner. of record the sum of $3.00 per share. Denies all other allegations contained in subparagraph I (g) of paragraph 5 of the petition.

I (h) and (i). Admits that on July 1, 1933, the Great Southern Lumber Company paid $672.00 to the petitioner. Denies all other allegations contained in subparagraphs I (h) and (i) of paragraph 5 of the petition.

I (j). Admits that petitioner did not include any part of the amount so received in her taxable income for the year 1933. Denies all other allegations contained in subparagraph I (j) of paragraph 5 of the petition.

I (k). Admits the allegations contained in subparagraph I (k) of paragraph 5 of the petition.

II (l). Admits that petitioner's father, Seymour H. Knox, died on May 16, 1915, leaving a last will and testament, by which 20% of the residue of the estate (not including certain bank stocks) was devised and bequeathed in trust for the benefit of the petitioner. Denies all other allegations contained in subparagraph II (l) of paragraph 5 of the petition.

II (m). Admits that during the years 1924 to 1930, inclusive, the trustees of the aforesaid testamentary trust acquired

40 for petitioner's benefit the securities described in subparagraph II (m) of paragraph 5 of the petition; and admits that the cost of said securities to the trustees was as stated in the said subparagraph. Denies all other allegations, if any, contained in subparagraph II (m) of paragraph 5 of the petition.

II (n). Admits that on or about August 26, 1931, the testamentary trustees delivered to the petitioner the securities referred to in subparagraph II (m) of paragraph 5 of the petition. Denies all other allegations contained therein.

II (o). Admits the allegations contained in subparagraph II (o) of paragraph 5 of the petition.

II (p). Admits that in her return for the calendar year 1933, which was filed with the Collector of Internal Revenue at Buffalo, New York, on or about March 15, 1934, petitioner reported capital losses on the sales of said securities in the amounts stated in the last column of the tabulation contained in subparagraph II (p) of paragraph 5 of the petition. Admits that the amounts thereof were computed as stated in said tabulation. Denies all other allegations contained in said subparagraph.

II (q). Admits that the Commissioner has reduced the basis claimed by the petitioner in her return in respect of said securities and has reduced the capital losses claimed by her on the sales thereof in the amounts stated in subparagraph II (q) of paragraph 5 of the petition. Admits that said reductions were made on the ground that petitioner's basis for said securities was the cost thereof to the testamentary trustees. Denies all other allegations contained in said subparagraph.

41 III (r). Admits the allegations contained in subparagraph III (r) of paragraph 5 of the petition.

III (s). Admits that on or about July 1, 1921, the executors distributed certain shares of the capital stock of The Atchison, Topeka & Santa Fe Railway Company pursuant to the terms of the last will and testament of petitioner's father, and transferred 100 of said shares to the testamentary trustees of a trust of which petitioner was the sole beneficiary. Admits that on July 1, 1921, the fair market value of said 100 shares of stock was $8,050.00. Denies all other allegations contained in subparagraph III (s) of paragraph 5 of the petition.

III (t). Admits that on April 30, 1928, said testamentary trustees acquired by the exercise of stock rights 4 additional shares of said stock for $400.00.

III (u). Admits that upon petitioner attaining the age of 35 years on August 26, 1931, the testamentary trustees transferred said 104 shares of stock of The Atchison, Topeka & Santa Fe

Railway Company to petitioner. Denies all other allegations contained in subparagraph III (u) of paragraph 5 of the petition.

III (v). Admits the allegations contained in subparagraph III (v) of paragraph 5 of the petition.

III (w). Admits that on her income tax return for the year 1933 petitioner claimed a capital loss of $9,463.46 on the sale of said 104 shares of stock. Denies all other allegations contained in subparagraph III (w) of paragraph 5 of the petition.

42 III (x). Admits that the Commissioner determined that petitioner sustained a capital loss on said sale of only $3,665.46, the same being the difference between the fair market value of the 100 shares on July 1, 1921, plus the cost to the trustees of the 4 shares later acquired by them, and the sale price of $4,784.54. Denies all other allegations contained in subparagraph III (x) of paragraph 5 of the petition.

IV (y). Admits that on July 1, 1921, the executors of petitioner's father's estate distributed certain shares of the common capital stock of United States Steel Corporation and transferred 600 shares thereof to the trustees of the testamentary trust of which petitioner was the sole beneficiary. Admits that on that date said 600 shares of stock had a fair market value of $44,700.00. Admits that on said date said executors also distributed certain bonds of the City of New York (4¼'s of 1960) and transferred $10,000.00 face value of said bonds to said testamentary trustees for petitioner. Admits that the Commissioner has determined that said bonds had a fair market value on July 1, 1921, of $10,075.00, but avers that said determination of value was erroneous in that the fair market value of said bonds on said date was substantially less than said amount, to-wit: $8,375.00. Respondent therefore alleges that the Commissioner thereby understated petitioner's capital net gain for the year 1933 by the amount of $2,000.00. Except as herein admitted, respondent denies all allegations contained in subparagraph IV (y) of paragraph 5 of the petition.

IV (z). Admits that upon petitioner attaining the age of 28 years on August 26, 1924, said testamentary trustees trans-

43 ferred to her said 600 shares of common stock of United States Steel Corporation. Denies all other allegations contained in subparagraph IV (z) of paragraph 5 of the petition.

IV (aa), (bb), and (cc). Admits the allegations contained in subparagraphs IV (aa), (bb), and (cc) of paragraph 5 of the petition.

IV (dd). Admits that upon petitioner attaining the age of 35 years on August 26, 1931, said testamentary trustees transferred to her the aforesaid $10,000.00 face amount of bonds of the City of New York (4¼'s of 1960). Denies all other allega-

tions contained in subparagraph IV (dd) of paragraph 5 of the petition.

IV (ee). Admits the allegations contained in subparagraph IV (ee) of paragraph 5 of the petition.

IV (ff). Admits that during 1933 petitioner sold said $10,000.00 face amount of bonds of the City of New York for $8,037.50.

IV (gg). Admits that in her return for the year 1933 petitioner reported a capital loss of $66,600.33 on the sale of said 1,142 shares of United States Steel Corporation stock; and a capital loss of $2,431.25 on the sale of said bonds of the City of New York. Denies all other allegations contained in subparagraph IV (gg) of paragraph 5 of the petition.

IV (hh). Admits that the Commissioner has determined the petitioner's capital losses on the aforesaid sales were $45,975.33 and $2,037.50, respectively, and that said determination
44 was based upon the ground that petitioner's basis for gain or loss in respect of said stock and bonds distributed by the executors of the estate and transferred to the aforesaid testamentary trustees on July 1, 1921, was the fair market value of said securities on that date, but avers that the Commissioner overvalued the aforesaid bonds as hereinabove alleged. Denies all other allegations contained in subparagraph IV (hh) of paragraph 5 of the petition.

V (ii). Admits that on July 1, 1921, the executors of the estate of petitioner's father distributed certain bonds of the City of Philadelphia and certain bonds of the City of Rochester, and transferred to the trustees of the aforesaid testamentary trust for petitioner's benefit the bonds described in subparagraph V (ii) of paragraph 5 of the petition. Admits that the Commissioner determined the fair market value of said bonds on July 1, 1921, to be the amounts stated in said subparagraph. Denies all other allegations therein contained.

V (jj) and (kk). Admits that when petitioner attained the age of 28 years on August 26, 1924, said testamentary trustees transferred the above-mentioned bonds of the City of Philadelphia to petitioner. Admits that when the petitioner attained the age of 35 years on August 26, 1931, said testamentary trustees transferred said bonds of the City of Rochester to petitioner. Denies all other allegations contained in subparagraphs V (jj) and (kk) of paragraph 5 of the petition.

V (ll) and (mm). Admits the allegations contained in subparagraphs V (ll) and (mm) of paragraph 5 of the petition.

V (nn). Admits that in her return for the calendar year 1933 petitioner claimed a capital loss of 9,073.75 on the

45 sale of said City of Philadelphia bonds, and a capital loss of $974.00 on the maturity of said City of Rochester bonds. Denies all other allegations contained in subparagraph V (nn) of paragraph 5 of the petition.

V (oo). Admits that the Commissioner determined that petitioner's loss on the sale of the City of Philadelphia bonds was $8,281.26, and on the maturity of the City of Rochester bonds $82.50, the same being the difference between the fair market value of said securities on July 1, 1921, and the amounts received therefor by petitioner in 1933. Denies all other allegations contained in subparagraph V (oo) of paragraph 5 of the petition.

VI (pp). Admits that on or prior to June 15, 1925, the trustees of the aforesaid testamentary trust acquired for petitioner's benefit 214 shares of common stock of Niagara, Lockport & Ontario Power Company. Denies all other allegations contained in subparagraph VI (pp) of paragraph 5 of the petition.

VI (qq). Admits the allegations contained in subparagraph VI (qq) of paragraph 5 of the petition.

VI (rr). Admits that on August 31, 1925, the testamentary trustees purchased for $1,202.50 32½ additional shares of the common stock of the Buffalo, Niagara & Eastern Power Corporation.

VI (ss) and (tt). Admits the allegations contained in subparagraphs VI (ss) and (tt) of paragraph 5 of the petition.

46 VI (uu) and (vv). Admits that in 1929 said testamentary trustees exchanged said 300 shares of common stock of Buffalo, Niagara and Eastern Power Corporation for 1,200 shares of the common capital stock of Niagara Hudson Power Corporation and 300 Niagara Hudson Power Corporation option warrants, and exchanged said 75 shares of Class A common stock of Buffalo, Niagara and Eastern Power Corporation for 300 shares of the common capital stock of Niagara Hudson Power Corporation and 75 Niagara Hudson Power Corporation option warrants. Denies all other allegations contained in subparagraphs VI (uu) and (vv) of paragraph 5 of the petition.

VI (ww). Admits that the exchanges mentioned in subparagraphs VI (uu) and (vv) above were transactions governed by the provisions of Sec. 112 (b) (3) or (b) (5) of the Revenue Act of 1928, and Sec. 113 (a) (6) of the Revenue Act of 1932; and that on the date said exchanges were made the stock and warrants received each had a substantial fair market value. Denies all other allegations contained in subparagraph VI (ww) of paragraph 5 of the petition.

VI (xx). Admits that on August 26, 1931, said testamentary trustees transferred to petitioner said 1,500 shares of common

stock and 375 option warrants of Niagara Hudson Power Corporation, and 300 shares of $25.00 par value preferred stock Buffalo, Niagara and Eastern Power Corporation. Denies all other allegations contained in subparagraph VI (xx) of paragraph 5 of the petition.

VI (yy). Admits the allegations contained in subparagraph VI (yy) of paragraph 5 of the petition.

VI (zz). Admits that on or about December 21, 1933, petitioner sold said 500 shares of common stock of Niagara
47 Hudson Power Corporation and said 125 option warrants of said corporation for a total consideration of $2,434.47; and sold said 300 shares of the $25.00 par value preferred stock of Buffalo, Niagara and Eastern Power Corporation for $4,750.50. Denies all other allegations contained in subparagraph VI (zz) of paragraph 5 of the petition.

VI (aaa). Admits that in her return for the calendar year 1933 petitioner reported capital losses on account of the sale of said securities in the amounts set forth in subparagraph VI (aaa) of paragraph 5 of the petition. Denies all other allegations contained therein.

VI (bbb). Admits that the Commissioner determined that the petitioner sustained a capital loss in the net amount of $3,148.30 from the sale of said 500 shares of common stock and said 125 option warrants of Niagara Hudson Power Corporation. Admits that the Commissioner determined that petitioner realized a capital gain of $2,313.46 on the sale of said 300 shares of preferred stock of Buffalo, Niagara and Eastern Power Corporation. Denies all other allegations, if any, contained in subparagraph VI (bbb) of paragraph 5 of the petition.

VI (ccc) and (ddd). Admits that in determining the adjusted loss on the Niagara Hudson common stock and warrants the Commissioner has used an aggregate adjusted cost basis of $5,582.77 based upon costs to said testamentary trustees. Denies all other allegations contained in subparagraphs VI (ccc) (ddd) of paragraph 5 of the petition.

VI (eee). Admits that in determining a gain on the sale of the preferred stock of Buffalo, Niagara and Eastern Power
48 Corporation the Commissioner has used an aggregate cost basis of $2,437.04, based upon costs to said testamentary trustees. Denies all other allegations contained in subparagraph VI (eee) of paragraph 5 of the petition.

VI (fff). Admits that on July 1, 1921, petitioner's father's executors distributed certain shares of $100.00 par value common stock of the F. W. Woolworth Company, and transferred to the trustees of the testamentary trust for petitioner's benefit 4,960

shares thereof. Admits the said shares on that date had a fair market value of $110.00 per share or an aggregate fair market value of $545,600.00. Admits that on or about June 30, 1924, said trustees, pursuant to corporate action for the reduction in par value of said shares, exchanged the 4,960 shares of $100.00 par value stock for 19,840 shares of common stock of said company of the par value of $25.00 per share. Denies all other allegations contained in subparagraph VII (fff) of paragraph 5 of the petition.

VII (ggg). Admits that upon petitioner becoming 28 years of age August 26, 1924, said trustees transferred to her 9,920 of said shares of $25.00 par value stock. Denies all other allegations contained in subparagraph VII (ggg) of paragraph 5 of the petition.

VII (hhh). Admits that the trustees increased their holdings of the remaining stock from 9,920 shares to 10,000 shares. Admits that in 1927 the F. W. Woolworth Company declared a 50% stock dividend. Admits that in 1929 the corporation further reduced the par value of its common shares from $25.00 to $10.00 per share and issued to its stockholders 2½ new shares for
49 each old share of $25.00 par value stock. Denies all other allegations contained in subparagraph VII (hhh) of paragraph 5 of the petition.

VII (iii). Admits that upon petitioner attaining the age of 35 years on August 26, 1931, said trustees transferred to her 37,500 shares of $10.00 par value stock of F. W. Woolworth Company. Denies all other allegations contained in subparagraph VII (iii) of paragraph 5 of the petition.

VII (jjj). Admits that in 1933 the petitioner sold 8,500 shares of $10.00 par value stock of F. W. Woolworth Company and received therefor the sum of $332,105.00. Denies all other allegations contained in subparagraph VII (jjj) of paragraph 5 of the petition.

VII (kkk). Admits that in her return for the calendar year 1933 petitioner claimed a capital loss on the sale of 8,500 shares of $10.00 par value stock of F. W. Woolworth Company in the amount of $245,895.00. Denies all other allegations contained in subparagraph VII (kkk) of paragraph 5 of the petition.

VII (lll). Admits that the Commissioner has disallowed said capital loss and has determined a capital gain of $269,771.67 from the sale of stock of the F. W. Woolworth Company in 1933. Admits that the lot of Woolworth stock transferred to petitioner on August 26, 1924, subsequently became 37,200 shares of the par value of $10.00 per share. Denies all other allegations contained in subparagraph VII (lll) of paragraph 5 of the petition.

Denies generally and specifically each and every allegation contained in the taxpayer's petition not hereinbefore admitted, qualified, or denied.

50 6. In the event it be determined that the Commissioner erred against the petitioner in respect of the securities mentioned in subparagraphs II, III, IV, V, VI, and VII of paragraph 4 of the petition, respondent avers that the Commissioner erred in favor of the petitioner by overstating petitioner's losses in respect of the following securities:

(a) 184½ shares Niagara Share common stock;
(b) 100 shares Northern Pacific common stock;
(c) 125 shares Southern Pacific common stock;
(d) 320 shares Hotels Statler common stock;
(e) 37M bonds of Federal Land Bank (St. Paul);
(f) 20M bonds of Federal Land Bank (Louisville); and
(g) 10M New York City bonds (corporate stock) (4¼'s—1963).

7. In support of the aforesaid allegations of error, and in further defense of the deficiency determined, respondent relies upon following additional facts:

(a) During the year 1933 the petitioner sold and disposed of the following securities, for sales prices as indicated:

Description	Sales prices
184½ shares Niagara Share common stock	$490.88
100 shares Northern Pacific common stock	1,943.00
125 shares Southern Pacific common stock	2,306.87
320 shares Hotels Statler common stock	2,833.60
37M bonds of Federal Land Bank (St. Paul) (4½'s of 1952)	32,143.75
20M bonds of Federal Land Bank (Louisville) (4½'s of 1953)	16,475.00
10M bonds (corporate stock), New York City (4½'s—1963)	8,487.50

51 (b) The aforesaid 184½ shares of Niagara Share common stock consisted of 180 shares received by petitioner on or about June 3, 1932 (in the ratio of 1 for 5), in exchange for 900 shares of the same stock, in connection with a reduction in the par value of the corporation's outstanding stock; and 4½ shares of the new stock received by petitioner as a stock dividend on or about July 15, 1932. Of the aforesaid 900 shares of old stock, petitioner acquired 620 shares by purchase on or about January 29, 1931, at a cost of $4,72[illegible].02. The remaining 280 shares were purchased, prior to August 26, 1931, by the trustees of the testamentary trust set up for petitioner's benefit under the will of petitioner's father. The cost thereof to said trustees was $4,760.00. Said 280 shares were transferred by the trustees to the petitioner upon her attaining the age of 35 years on August 26, 1931.

(c) The aforesaid 100 shares of Northern Pacific common stock were acquired by petitioner pursuant to the provisions of

her father's will. Sixty shares thereof were owned by petitioner's father on the date of his death and were transferred by the executors to the trustees of said testamentary trust on July 1, 1921, on which date they had a fair market value of $4,170.00. The remaining 40 shares were purchased by the trustees in 1925 at a cost of $2,777.00. Said 100 shares were transferred to petitioner by said trustees on August 26, 1931.

(d) The aforesaid 125 shares of Southern Pacific common stock were acquired by petitioner pursuant to the provisions of said will. Said shares were owned by petitioner's father on the date of his death, and were transferred by the executors to said trustees on July 1, 1921, on which date their fair market value was $9,296.88. They were transferred to petitioner by the trustees on August 26, 1931.

52 (e) The aforesaid 320 shares of Hotels Statler common stock consisted of 160 shares transferred to petitioner by the trustees of said testamentary trust on August 26, 1924, and 160 shares received by petitioner as a stock dividend in 1929. Said stock was owned by petitioner's father on the date of his death, and was transferred from the executors to said testamentary trustees on July 1, 1921, on which date its fair market value was $12,000.00.

(f) The aforesaid bonds of the Federal Land Bank (St. Paul) were transferred by said testamentary trustees to the petitioner on August 26, 1924. Said bonds were purchased by said testamentary trustees in 1922 at a cost of $37,462.50.

(g) The aforesaid bonds of Federal Land Bank (Louisville) were transferred to petitioner by said testamentary trustees on August 26, 1924. Said bonds had been theretofore purchased by said testamentary trustees at a cost of $20,100.00.

(h) The aforesaid bonds (corporate stock) of the City of New York (4¼'s of 1963) were acquired by the petitioner under the provisions of her father's will. They were distributed by the executors and transferred to said trustees on July 1, 1921. On said date they had a fair market value of $8,612.50, being the mean between low and high quotations of 83¼ and 89, respectively. The Commissioner erroneously determined the value of said bonds on July 1, 1921, to be $10,537.50, and thereby overstated their value on said date by the sum of $1,925.00. In the event July 1, 1921, be held to be the proper basic date, respondent hereby makes claim to the increased deficiency resulting from the correction of said error of valuation. The aforesaid bonds

53 were transferred to petitioner by the testamentary trustees on August 26, 1924.

(i) The respective fair market values of said securities on the dates they were transferred to petitioner by the trustees of said testamentary trust, and the respective bases allowed by the Commissioner in determining the deficiency for the year 1933, were as follows:

Description	Values when transferred to petitioner	Basis allowed by Commissioner
280 shares Niagara Share common stock transferred August 26, 1931	$1,785.00	$4,780.00
100 shares Northern Pacific common stock transferred August 26, 1931	3,312.50	6,947.00
125 shares Southern Pacific common stock transferred August 26, 1931	9,156.25	9,296.88
160 shares Hotels Statler common stock transferred August 26, 1924	9,600.00	12,000.00
37M bonds of Federal Land Bank (St. Paul), 4½'s of 1952, transferred August 26, 1924	37,046.25	37,462.50
20M bonds of Federal Land Bank (Louisville), 4½'s of 1953, transferred August 26, 1924	20,075.00	20,100.00
10M bonds (corporate stock) New York City 4¼'s—1963, transferred August 26, 1924	10,100.00	10,537.50

(j) In determining the deficiency the Commissioner allowed a deduction for contributions in the amount of $3,-
54 380.24. In the event it be determined that petitioner's net income for 1933 has been overstated, then the deduction for contributions should be reduced to an amount not exceeding 15% of the net income as redetermined.

8. In further defense of the Commissioner's determination, and in support of an alternative claim to an increased deficiency for the year 1933, respondent relies upon the following additional facts:

(a) With respect to the securities sold by petitioner in the year 1933, which were owned by petitioner's father on the date of his death or derived from securities owned by petitioner's father on the date of his death, such securities were acquired by petitioner by transfer in trust before January 1, 1921; and the bases to petitioner of the securities so acquired were the fair market values thereof on May 16, 1915, as provided in Sec. 113 (a) (4) of the Revenue Act of 1932.

(b) On information and belief, the fair market values of said securities owned by petitioner's father on the date of his death were less than the amounts used as bases by the Commissioner in making his determination, and were less than the respective bases claimed by the petitioner in this proceeding.

(c) With respect to securities sold by petitioner in 1933, which were purchased by the executors or which were derived from securities purchased by the executors, such securities were acquired by petitioner by purchase, and the bases to petitioner of the securities so acquired were the respective costs thereof, viz., the amounts paid by the executors.

55 (d) On information and belief, the respective costs of such securities were less than the bases used by the Commissioner in his determination, and were less than the bases claimed by the petitioner in this proceeding.

Wherefore, it is prayed that the Board redetermine the correct amount of the deficiency involved in this proceeding to be equal to the amount determined by the Commissioner, viz, $65,549.60 plus any and all additional amounts which may result from the correction of any error made by the Commissioner. The Commissioner hereby makes claim for the increased deficiency resulting from such redetermination.

(Signed) HERMAN OLIPHANT,
Herman Oliphant,
General Counsel for the Department of the Treasury,
Attorney for Respondent.

Of Counsel:
F. R. SHEARER,
E. L. UPDIKE,
Special Attorneys for the
Bureau of Internal Revenue.

56 Before United States Board of Tax Appeals

Docket No. 84640

[Same title.]

Reply

Filed Sept. 5, 1936

The petitioner, by her attorney, Ralph M. Andrews, in reply to respondent's answer herein, admits and denies the affirmative allegations thereof as follows:

4 IV. Admits as alleged in paragraph "4 IV" of respondent's answer that the Commissioner's final determination overvalued $10,000 face amount of the corporate stock of the City of New York for water supply purposes, 4¼'s of 1960, as of July 1, 1921, but denies that said overvaluation is material or that the Commissioner has thereby erred in favor of the petitioner.

5 IV (y). Admits that the $10,000 face amount of corporate stock of the City of New York, 4¼'s of 1960 described in paragraph "5 IV (y)" of the respondent's answer was overvalued by the Commissioner as of July 1, 1921. Denies all other allegations in said paragraph contained.

5 IV (hh). Admits that the Commissioner overvalued as of July 1, 1921, the value of $10,000 face amount of corporate stock of the City of New York, 4¼'s of 1960. Denies each and every other allegation contained in paragraph "5 IV (hh)," of respondent's answer.

57 6. Admits that the Commissioner erred in failing to determine the losses sustained by the petitioner on the sale of the securities described in paragraph "6" of respondent's answer on the basis of the fair market value of said securities on the date they were distributed by petitioner's father's trustees to petitioner. Denies each and every other allegation contained in paragraph "6."

7 (a). Admits the allegations contained in paragraph "7 (a)" of respondent's answer.

7 (b)–7 (g), inclusive. Admits the allegations contained in paragraphs "7 (b)"–"7 (g)," inclusive, of respondent's answer.

7 (h). Admits that the corporate stock of the City of New York, 4¼'s of 1963, described in paragraph "7 (h)" of respondent's answer were acquired by petitioner pursuant to the provisions of her father's will. Admits that said corporate stock was transferred by her father's executors to her father's testamentary trustees of July 1, 1921. Admits that on the latter date said stock was quoted at varying prices from a low of 83¼ to a high of 89. Admits that the Commissioner determined the value of said corporate stock of July 1, 1921, to be $10,537.50. Admits that said corporate stock was distributed to petitioner by her father's testamentary trustees on August 26, 1924. Denies each and every other allegation contained in said paragraph "7 (h)."

7 (i). Admits the allegations contained in paragraph "7 (i)" of respondent's answer.

7 (j). Admits that in determining the deficiency the Commissioner allowed a deduction for contributions of $3,380.24. Admits that the deduction to which petitioner is entitled for con-

58 tribution must be determined in accordance with the provisions of Section 23 (n) of the Revenue Act of 1932. Denies each and every other allegation in said paragraph "7 (j)" contained.

8 (a). Denies the allegations contained in paragraph "8 (a)" of respondent's answer.

8 (b). Denies that the fair market values of all of the securities owned by petitioner's father at the time of his death were less than the amounts used as bases by the Commissioner in making his determination and were less than the respective bases claimed by the petitioner in this proceeding.

8 (c). Denies the allegations contained in paragraph "8 (c)" of respondent's answer.

8 (d). Denies the allegations contained in paragraph "8 (d)" of respondent's answer.

Denies generally and specifically each and every allegation contained in respondent's answer not hereinbefore admitted, qualified, or denied.

Wherefore, petitioner prays that the Board may hear this proceeding and determine that the respondent erred in the respects stated in paragraph "4" of the petition, that the claims for an additional deficiency made in respondent's answer are without merit and should be denied and that petitioner is entitled to the relief prayed for in paragraph "6" of the petition.

(S) RALPH M. ANDREWS,
Counsel for Petitioner,
Office and Post Office Address, 1330 Marine Trust Bldg., 239 Main Street, Buffalo, New York.

59 [*Duly sworn to by Dorothy K. G. Rogers; jurat omitted in printing.*]

60 Before United States Board of Tax Appeals

Docket No. 84640

[Same title.]

Amendments of petition

Filed at Hearing, Dec. 14, 1938

The petition in this proceeding is amended in the following respects:

Paragraph 4–III is amended to read as follows:

"The determination by the Commissioner of Internal Revenue that, for the purpose of determining gain or loss, petitioner's cost basis on the sale during the calendar year 1933 of certain shares of the capital stock of The Atchison, Topeka & Sante Fe Railway Company, which petitioner had acquired from her father's testamentary trustees, was as follows:

"i. As to so much thereof as was purchased by her father prior to his death, the fair market value of said securities on the date of their transfer by her father's executors to her father's testamentary trustees.

"ii. As to so much thereof as was purchased by her father's testamentary trustees, the cost thereof to said trustees."

Paragraph 4–IV is amended to read as follows:

61 "The determination by the Commissioner of Internal Revenue that, for the purpose of determining gain or loss, petitioner's cost basis on the sale during the calendar year 1933 of certain shares of the common capital stock of United States Steel Corporation and of certain corporate stock of the City of New York issued for water supply purposes (4¼'s of 1960), which petitioner had acquired from her father's testamentary trustees, and which had been purchased by her father prior to his death, was the fair market value of said securities on the date of the transfer thereof by her father's executors to her father's testamentary trustees."

Paragraph 4–V is amended to read as follows:

"The determination by the Commissioner of Internal Revenue that, for the purpose of determining gain or loss, petitioner's cost basis on the sale during the calendar year 1933 of certain bonds of the City of Philadelphia (4's of 1946) and on the maturity during the calendar year 1933 of certain bonds of the City of Rochester (4½'s of 1933), which petitioner had acquired from her father's testamentary trustees, and which had theretofore been purchased by her father's executors, was the fair market value of said securities on the date of the transfer thereof by her father's executors to her father's testamentary trustees."

Paragraph 4–VII is amended to read as follows:

"The determination by the Commissioner of Internal Revenue that on petitioner's sale during the calendar year 1933 of 8,500 shares of the capital stock of F. W. Woolworth Company, petitioner derived a capital gain of $269,771.67 instead of sustaining a capital loss of $256,520.00, upon the grounds (as stated in the deficiency notice):

62 "That 'an analysis of your account with the Woolworth stock shows that through the 2½ for 1 exchange in 1929, the identity of your various holdings in this stock was lost. Therefore, in accordance with article 600 (4) of Regulations 77, the 8,500 shares sold in 1933 have been held to have come from the earliest acquisitions of the stock;' and

"ii. That petitioner's cost basis in the F. W. Woolworth Company stock distributed to her by her father's testamentary trustees, and which had theretofore been purchased by her father prior to his death, is the fair market value of said stock on July 1, 1921, the date of the transfer thereof by her father's executors to her father's testamentary trustees."

Paragraph 5–I–(j) is amended to read as follows:

"(j) The amount distributed by said Great Southern Lumber Company to petitioner, as aforesaid, was less than the fair market value of said stock on August 26, 1924, the date on which said stock was distributed to petitioner by her father's testamen-

tary trustees, and was less than the fair market value of said stock on July 1, 1921, the date on which said stock was transferred by her father's executors to his testamentary trustees, as adjusted on account of intervening distributions from capital, and petitioner did not include any part of the amount so received in her taxable net income for the year 1933."

Paragraph 5–III–s is amended to read as follows:

"(s) Pursuant to the provisions of petitioner's father's will above quoted at paragraph II (1), 20% of said shares
63 of stock of The Atchison, Topeka & Santa Fe Railway Company or 100 shares, was transferred by the executors to the testamentary trustees for petitioner on July 1, 1921. Said stock had a fair market value on that date of $80.50 per share, or a total value of $8,050.00."

Paragraph 5–III–(x) is amended to read as follows:

"(x) The Commissioner of Internal Revenue, in his final determination, has determined that the petitioner's loss on said sale was $3,665.46, being the difference between the fair market value of 100 of said shares on the date they were transferred to the testamentary trustees by the executors, plus the trustees' cost of the 4 shares purchased by them in 1928, and the sale price thereof."

Paragraph 5–IV–(y) is amended to read as follows:

"(y) On July 1, 1921, the executors of petitioner's father's estate transferred to the testamentary trustees for petitioner, pursuant to the provisions of the will above quoted at paragraph II (1), 600 shares of the common capital stock of United States Steel Corporation, which, on that date, had a fair market value of $74.50 per share, or a total fair market value of $44,700.00, and $10,000.00 face amount of the corporate stock of the City of New York issued for water supply purposes (4¼'s of 1960) which the Commissioner has determined had a fair market value on said date of $10,075.00."

Paragraph 5–IV–(hh) is amended to read as follows:

"(hh) The Commissioner of Internal Revenue, in his final determination, has determined that petitioner's capital
64 loss on the sale of said United States Steel Corporation stock was $45,975.33, and on the sale of said corporate stock of the City of New York was $2,037.50, upon the ground that the proper basis, for tax purposes, in computing petitioner's gain or loss, was the fair market value on July 1, 1921, of so much of said securities as was acquired by petitioner from her

father's testamentary trustees, and which was transferred to said trustees by her father's executors on said July 1, 1921."

Paragraph 5-V-(ii) is amended to read as follows:

"(ii) On July 1, 1921, the executors of the estate of petitioner's father transferred to the testamentary trustees for petitioner, pursuant to the provisions of the will above quoted at paragraph II (1), $50,000.00 face amount of the bonds of the City of Philadelphia, Pennsylvania (4's of 1946) and $20,000.00 face amount of the bonds of the City of Rochester, New York (4½'s of 1933). Upon information and belief, the Commissioner of Internal Revenue has determined the fair market value of said City of Philadelphia bonds on the date of said transfer to be $50,687.50, and of said City of Rochester bonds to be $20,082.50."

Paragraph 5-V-(kk) is amended to read as follows:

"(kk) When petitioner attained the age of 28 years on August 26, 1924, said testamentary trustees distributed said bonds of the City of Rochester to petitioner. On that date said bonds had a fair market value of $104.87 per $100.00, or a total value of $20,974.00."

Paragraph 5-V-(oo) is amended to read as follows:

65 "(oo). The Commissioner of Internal Revenue, in his final determination, has determined that petitioner's loss on the sale of said bonds of the City of Philadelphia was $8,281.25, and on the maturity of the said bonds of the City of Rochester was $82.50, being the difference between the fair market value of said securities on the date on which they were transferred by petitioner's father's executors to his testamentary trustees, and the amounts received therefor by petitioner during the calendar year 1933."

Paragraph 5-VI-(pp) is amended to read as follows:

"(pp) On June 15, 1925, the executors of the estate of petitioner's father transferred to the testamentary trustees for petitioner, pursuant to the provision of the will above quoted at paragraph II (1), 214 shares of the common capital stock of Niagara, Lockport & Ontario Power Company, which had theretofore cost said executors $4,537.06. Said 214 shares had a fair market value on said June 15, 1925, of $76.00 per share, or an aggregate value of $16,264.00."

Paragraph 5-VI-(qq) is amended to read as follows:

"(qq) Thereafter and on or about August 1, 1925, said testamentary trustees exchanged said 214 shares of Niagara, Lockport & Ontario Power Company common stock for 267½ shares of the $25.00 par value preferred stock (sometimes referred to as $1.60 preferred stock) and 267½ shares of the common stock of

Buffalo, Niagara & Eastern Power Corporation, said exchange being pursuant to a plan of reorganization to which both said Niagara, Lockport & Ontario Power Company and Buffalo,
Niagara & Eastern Power Corporation were parties. On
66 the date of said exchange the fair market value of said common stock of Buffalo, Niagara & Eastern Power Corporation was $42.375 per share and of the preferred stock of said corporation was $24.375 per share."

Paragraph 5–VII–(fff) is amended to read as follows:

"(fff) On July 1, 1921, petitioner's father's executors transferred to the testamentary trustees for petitioner, in accordance with the terms of the will quoted above, 4,960 shares of the par value of $100.00 per share of the F. W. Woolworth Company which on that date had a fair market value of $110.00 per share, or an aggregate fair market value of $545,600.00. Subsequently and on or about June 30, 1924, said trustees, pursuant to proper corporate action by which reduction in the par value of shares from $100.00 to $25.00 was accomplished, exchanged said 4,960 shares of $100.00 par value of F. W. Woolworth Company stock for 19,840 shares of $25.00 par value of stock of said company."

Paragraph 6–V is amended to read as follows:

"For the purpose of determining gain or loss on petitioner's sale during the calendar year 1933 of the bonds of the City of Philadelphia, Pennsylvania (4's of 1946), and on the maturity during the calendar year 1933 of the bonds of the City of Rochester, New York (4½'s of 1933), petitioner's cost basis is the fair market value of said bonds on August 26, 1924, the date on which said securities were distributed to petitioner by her father's testamentary trustees."

Paragraph 6–VII is amended to read as follows:

67 "On the sale during the calendar year 1933 of 8,500 shares of $10 par value stock of F. W. Woolworth Company, petitioner sustained a capital loss of $256,520.00, that said stock was sold out of the lot of 37,500 shares of $10 par value acquired by petitioner from her father's testamentary trustees on August 26, 1931, and that petitioner's cost basis in said stock is the fair market value thereof on said August 26, 1931, the date on which it was distributed to her by her father's testamentary trustees.

(S) RALPH M. ANDREWS,
Counsel for Petitioner,
Office and Post-office Address, 1330 Marine Trust Building,
239 Main Street, Buffalo, New York.

68 [*Duly sworn to by Dorothy K. G. Rogers; jurat omitted in printing.*]

69 Before United States Board of Tax Appeals

Docket No. 84640

[Same title.]

Answer to amendments of petition

(Filed at hearing Dec. 14, 1938)

Comes now the Commissioner of Internal Revenue by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the amendments of petition filed in the above-entitled appeal admits, denies, avers, and alleges as follows:

4–III. Admits that the Commissioner of Internal Revenue in his notice of deficiency determined that the petitioner's basis for computing the gain or loss on the sale during 1933 of certain shares of stock of The Atchison, Topeka & Santa Fe Railway Company was as follows: As to the shares owned by petitioner's father on the date of his death the fair market value thereof on the date of their transfer by her father's executors to the trustees of the trust created under Article Twenty-First (B) of petitioner's father's will and as to the shares purchased by the trustees the cost thereof to the trustees. Denies that the Commissioner thereby erred and denies all other allegations contained in subparagraph III of paragraph 4 of the amendments of petition.

4–IV. Admits that the Commissioner in his notice of deficiency determined that petitioner's basis for determining
70 gain or loss on the sale during 1933 of certain shares of common stock of United States Steel Corporation and of certain bonds or corporate stock of the City of New York (4¼'s of 1960) was the fair market values thereof on the date said securities were transferred by her father's executors to the trustees of the aforementioned trust. Denies that the Commissioner thereby erred against the petitioner and avers that the Commissioner erred in favor of the petitioner by overvaluing the aforesaid bonds of the City of New York. Denies all other allegations contained in subparagraph IV of paragraph 4 of the amendments of petition.

4–V. Admits that the Commissioner determined that petitioner's basis for determining gain or loss on the sale during 1933 of certain bonds of the City of Philadelphia (4's of 1946) and on the maturity during 1933 of certain bonds of the City of Rochester (4½'s of 1933) was the fair market values thereof on the date said securities were transferred by petitioner's father's executors to the trustees of the aforementioned trust. Denies

that the Commissioner thereby erred and denies all other allegations contained in subparagraph V of paragraph 4 of the amendments of petition.

4–VII. Admits that the Commissioner in his notice of deficiency determined that petitioner on the sale during the calendar year 1933 of 8,500 shares of the capital stock of F. W. Woolworth Company realized a capital gain of $269,771.67. Denies that the Commissioner thereby erred and denies all other allegations contained in subparagraph VII of paragraph 4 of the amendments of petition.

5–I–(j). Admits that petitioner did not include any part of the amount so received by her in her taxable income for the year 1933. Denies all other allegations contained in subparagraph I–(j) of paragraph 5 of amendments of petition.

71 5–III–(s). Admits that petitioner's father's executors on July 1, 1921, transferred of record and delivered to the trustees of the trust created by Article Twenty-First (B) of petitioner's father's will 100 shares of the capital stock of The Atchison, Topeka & Santa Fe Railway Company. Admits that said stock had a fair market value on that date of $80.50 per share, or a total value of $8,050.00. Denies all other allegations contained in subparagraph III–(s) of paragraph 5 of the amendments of petition.

5–III–(x). Admits that the Commissioner in his notice of deficiency determined that petitioner sustained a capital loss on said sale of only $3,665.46, the same being the difference between the fair market value of the 100 shares on July 1, 1921, plus the cost to the trustees of the four shares later purchased by them and the sale price of $4,784.54. Denies all other allegations contained in subparagraph III–(x) of paragraph 5 of the amendments of petition.

5–IV–(y). Admits that on July 1, 1921, the executors of petitioner's father's estate transferred of record and delivered to the trustees for petitioner (1) 600 shares of the common capital stock of the United States Steel Corporation which on that date had a fair market value of $74.50 per share, or a total fair market value of $44,700.00, and (2) $10,000.00 face amount of the bonds or corporate stock of the City of New York. Admits that the Commissioner has determined that said bonds had a fair market value on July 1, 1921, of $10.075.00 but avers that said determination of value was erroneous in that the fair market value of said bonds on said date was substantially less than said amount, to wit, $8,375.00.

72 Respondent therefore alleges that the Commissioner thereby understated petitioner's capital net gain for the year 1933 by the amount of $2,000.00. Denies all other allegations

contained in subparagraph IV-(j) of paragraph 5 of the amendments of petition.

5-IV-(hh). Admits that the Commissioner in his notice of deficiency determined the petitioner's capital losses on the aforesaid sales were $45,975.33 and $2,037.50, respectively. Admits that said determination was based upon the ground that petitioner's basis for gain or loss in respect to said stock and bonds was their fair market values on July 1, 1921, but avers that the Commissioner overvalued the aforesaid bonds as hereinabove alleged. Denies all other allegations contained in subparagraph IV-(hh) of paragraph 5 of the amendments of petition.

5-V-(ii). Admits that on July 1, 1921, the executors of the estate of petitioner's father transferred and delivered to the trustees for petitioner certain bonds of the City of Philadelphia and certain bonds of the City of Rochester. Admits that the Commissioner determined that the bonds of the City of Philadelphia and the bonds of the City of Rochester on July 1, 1921, had fair market values in the respective amounts of $50,687.50 and $20,082.50. Denies all other allegations contained in subparagraph V-(ii) of paragraph 5 of the amendments of petition.

5-V-(kk). Admits that when petitioner attained the age of twenty-eight years on August 26, 1924, the trustees transferred the bonds of the City of Rochester to petitioner. Denies all other allegations contained in subparagraph V-(kk) of paragraph 5 of the amendments of petition.

5-V-(oo). Admits that the Commissioner of Internal Revenue in his notice of deficiency has determined that petitioner's loss on the sale of the City of Philadelphia bonds
73 was $8,281.25 and on the maturity of the bonds of the City of Rochester was $82.50, the same being the difference between the fair market values of said securities on July 1, 1921, and the amounts received therefor by petitioner in 1933. Denies all other allegations contained in subparagraph V-(oo) of paragraph 5 of the amendments of petition.

5-VI-(pp). Admits that on or about June 15, 1925, the executors of the estate of petitioner's father transferred to the trustees for petitioner 214 shares of the common capital stock of Niagara, Lockport & Ontario Power Company which had theretofore cost said executors $4,537.06. Admits that said 214 shares had a fair market value on June 15, 1925, of $76.00 per share or an aggregate value of $16,264.00. Denies all other allegations contained in subparagraph VI-(pp) of paragraph 5 of the amendments of petition.

5-VI-(qq). Admits that on August 1, 1925, the trustees exchanged the 214 shares of common stock of Niagara, Lockport

& Ontario Power Company for 267½ shares of the $1.60 preferred stock and 267½ shares of the common stock of the Buffalo, Niagara & Eastern Power Corporation. Admits that such exchange was in pursuance to a plan of reorganization to which both Niagara, Lockport & Ontario Power Company and Buffalo, Niagara & Eastern Power Corporation were parties. Admits that on the date of such exchange the fair market value of said common stock of Buffalo, Niagara & Eastern Power Corporation was $42.375 per share and of the preferred stock of said corporation was $24.375 per share. Denies all other allegations contained in subparagraph VI–(qq) of paragraph 5 of the amendments of petition.

74 5–VII–(fff). Admits that on July 1, 1921, petitioner's father's executors transferred of record and delivered to the trustees for petitioner 4,960 shares of the common stock of F. W. Woolworth Company. Admits that on July 1, 1921, said stock had a fair market value of $110.00 per share. Denies all other allegations contained in subparagraph VII–(fff) of paragraph 5 of the amendments of petition.

6–V. Denies the allegations contained in subparagraph V of paragraph 6 of the amendments of petition.

6–VII. Denies the allegations contained in subparagraph VII of paragraph 6 of the amendments of petition.

Denies generally and specifically each and every allegation contained in the amendments of petition not hereinbefore specifically admitted, qualified or denied.

Wherefore it is prayed that the Board redetermine the correct amount of the deficiency involved in this proceeding to be equal to the amount determined by the Commissioner, viz, $65,549.60, plus any and all additional amounts which may result from the correction of any error made by the Commissioner. The Commissioner hereby makes claim for the increased deficiency resulting from such redetermination.

(Signed) J. P. WENCHEL,
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
W. HERDMAN SCHWATKA,
EDWARD L. UPDIKE,
Special Attorneys,
Bureau of Internal Revenue.

ELU–afh 12–12–38.

75 Before United States Board of Tax Appeals

Docket No. 84640

[Same title.]

Amended reply

Filed at Hearing, Dec. 14, 1938

The petitioner, by her attorney, Ralph M. Andrews, in reply to respondent's amended answer herein, admits and denies the affirmative allegations thereof as follows:

4 IV. Admits as alleged in paragraph "4 IV" of respondent's amended answer that the Commissioner's final determination overvalued $10,000.00 face amount of the corporate stock of the City of New York for water supply purposes, 4¼'s of 1960, as of July 1, 1921, but denies that said overvaluation is material or that the Commissioner has thereby erred in favor of the petitioner.

5 IV (y). Admits that the $10,000.00 face amount of corporate stock of the City of New York, 4¼'s of 1960, described in paragraph "5 IV (y)" of the respondent's amended answer was overvalued by the Commissioner as of July 1, 1921. Denies all other allegations in said paragraph contained.

5 IV (hh). Admits that the Commissioner overvalued as of July 1, 1921, the value of $10,000.00 face amount of corporate stock of the city of New York, 4¼'s of 1960. Denies each and every other allegation contained in paragraph "5 IV (hh)" of respondent's amended answer.

6. Admits that the Commissioner erred in failing to determine the losses sustained by the petitioner on the sale of the securities
76 described in paragraph "6" of respondent's amended answer on the basis of the fair market value of said securities on the date they were distributed by petitioner's father's trustees to petitioner. Denies each and every other allegation contained in paragraph "6."

7 (a). Admits the allegations contained in paragraph "7 (a)" of respondent's amended answer.

7 (b)–7 (g) inclusive. Admits the allegations contained in paragraphs "7 (b)"–"7 (g)" inclusive of respondent's amended answer.

7 (h). Admits that the corporate stock of the City of New York, 4¼'s of 1963, described in paragraph "7 (h)" of respondent's amended answer were acquired by petitioner pursuant to the provisions of her father's will. Admits that said corporate stock

was transferred by her father's executors to her father's testamentary trustees on July 1, 1921. Admits that on the latter date said stock was quoted at varying prices from a low of 83¼ to a high of 89. Admits that the Commissioner determined the value of said corporate stock of July 1, 1921, to be $10,537.50. Admits that said corporate stock was distributed to petitioner by her father's testamentary trustees on August 26, 1924. Denies each and every other allegation contained in said paragraph "7 (h)."

7 (i). Admits the allegations contained in paragraph "7 (i)" of respondent's amended answer.

7 (j). Admits that in determining the deficiency the Commissioner allowed a deduction for contributions of $3,380.24. Admits that the deduction to which petitioner is entitled for contributions must be determined in accordance with the provisions of
77 Section 23 (n) of the Revenue Act of 1932. Denies each and every other allegation in said paragraph "7 (j)" contained.

8. (a) Denies the allegations contained in paragraph "8 (a)" of respondent's amended answer.

8. (b) Denies that the fair market values of all of the securities owned by petitioner's father at the time of his death were less than the amounts used as bases by the Commissioner in making his determination and were less than the respective bases claimed by the petitioner in this proceeding.

8. (c) Denies the allegations contained in paragraph "8 (c)" of respondent's amended answer.

8. (d) Denies the allegations contained in paragraph "8 (d)" of respondent's amended answer.

Denies generally and specifically each and every allegation contained in respondent's amended answer not hereinbefore admitted, qualified, or denied.

Wherefore, petitioner prays that the Board may hear this proceeding and determine that the respondent erred in the respects stated in paragraph "4" of the amended petition, that the claims for an additional deficiency made in respondent's amended answer are without merit and should be denied and that petitioner is entitled to the relief prayed for in paragraph "6" of the amended petition.

(S) RALPH M. ANDREWS,
Counsel for Petitioner,
Office and Post-office Address, 1330 Marine Trust Building,
239 Main Street, Buffalo, New York.

78 Before United States Board of Tax Appeals

Docket No. 84640

[Same title.]

Stipulation of facts

Filed at Hearing Dec. 14, 1938

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the following facts shall be taken as true for the purpose of this proceeding and in the determination of the above appeal, provided, however, that this stipulation shall be without prejudice to the right of either party hereto to introduce other and further evidence at the hearing hereof not inconsistent with the facts herein stipulated to be true.

1. Dorothy K. G. Rogers, the petitioner herein, is a resident of Hyde Park, Dutchess County, State of New York, but at all times material in this proceeding was a resident of the County of Erie, State of New York.

I

2. With respect to the error alleged in paragraph 4–I of the petition herein and denied in paragraph 4–I of respondent's answer, it is now stipulated and agreed by the parties hereto, and without prejudice to either of them, that of the total dividends amounting to $672.00 received by petitioner during the
79 calendar year 1933, from Great Southern Lumber Company, 83.6544% or $562.16 is taxable to petitioner as determined by the respondent in his deficiency notice (page 2 of Exhibit A of the petition in this proceeding).

II

3. Petitioner was born on August 26, 1896 as Dorothy Knox. On October 23, 1915, she was married to Frank H. Goodyear. Mr. Goodyear died on October 13, 1930. Thereafter and on September 30, 1931, she was married to Edmund P. Rogers.

4. Petitioner's father, Seymour H. Knox, died on May 16, 1915, leaving a last will and testament, a true and correct copy of which is annexed hereto, designated Exhibit "A" and hereby made a part hereof. Said will was probated on June 3, 1915, in the office of the Surrogate of Erie County, New York. On June 3, 1915, letters testamentary of the last will and testament of Seymour H. Knox, deceased, were duly granted to Grace M.

Knox, Henry D. Knox, and Walter P. Cooke. Seymour H. Knox, petitioner's brother, attained the age of twenty-one years on September 1, 1919. On May 24, 1921, said Seymour H. Knox took and filed with the Surrogate of Erie County the oath of office as executor and on December 21, 1922, nunc pro tunc as of May 24, 1921, supplemental letters testamentary of said last will and testament were duly granted to him "jointly with said executors Grace M. Knox, Henry D. Knox, and Walter P. Cooke." Said executors are hereinafter referred to as "the executors."

5. On May 24, 1921, Henry D. Knox, Walter P. Cooke, and Seymour H. Knox (hereinafter referred to as "the trustees") took and filed with the Surrogate of Erie County, New York, their oaths of office as trustees of the trust under "Article Twenty-first (B)" of the will (Exhibit A). On July 1, 1921, the trustees opened their records and books of account and rented a safe deposit vault in the following name: "Walter P. Cooke, Henry D. Knox, Seymour H. Knox, Trustees for Dorothy K. Goodyear."

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6. The trustees purchased the following securities on the dates, in the amounts and for the purchase prices set out below:

Date	Quantity	Security	Purchase price
October 11, 1922	$37,000.00 face amount 4¼% bonds of May 1, 1942.	Federal Land Bank (St. Paul).	$37,462.50
May 3, 1923	$20,000.00 face amount 4½% bonds of January 1, 1953.	Federal Land Bank (Louisville).	20,100.00
June 2, 1924	$25,000.00 face amount 4¼% bonds of June 1, 1950.	County of Westchester	25,768.75
June 2, 1924	$25,000.00 face amount 4¼% bonds of June 1, 1959.	County of Westchester	25,901.25

7. On August 26, 1924, the petitioner attained her twenty-eighth birthday. On that date the trustees, pursuant to the will, transferred of record and delivered to the petitioner certain securities including the following securities which the trustees had theretofore purchased as stated in paragraph 6 hereof and which on August 26, 1924 had the fair market values set out below:

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Quantity	Security	Total value
$37,000.00 face amount 4¼% bonds of May 1, 1942	Federal Land Bank (St. Paul)	$37,092.50
$20,000.00 face amount 4½% bonds of January 1, 1953	Federal Land Bank (Louisville)	20,100.00

8. The trustees purchased the following securities on the dates, in the amounts and for the purchase prices set out below:

Date	Quantity	Security	Purchase price
December 21, 1925	150 shares common stock	American Telephone & Telegraph Company, City of New York.	$21,343.75
January 19, 1926	$16,000.00 face amount 4½% bonds of April 15, 1972.		16,180.00
July 30, 1926	25 shares common stock	American Telephone & Telegraph Company.	2,568.75
July 25, 1928	29 shares common stock	American Telephone & Telegraph Company.	2,900.00
June 5, 1929	34 shares common stock	American Telephone & Telegraph Company.	5,673.92
July 18, 1930	34 shares common stock	American Telephone & Telegraph Company.	3,515.60

9. On August 26, 1931, petitioner attained her thirty-fifth birthday. On that date the trustees of the aforesaid trust, pursuant to the will, transferred of record and delivered to petitioner certain securities including the following securities which the trustees had theretofore purchased as hereinbefore set out and which on August 26, 1931, had the fair market values set out below:

Quantity	Security	Fair market value
$25,000.00 face amount 4¼% bonds of June 1, 1950	County of Westchester	$27,166.52
$25,000.00 face amount 4¼% bonds of June 1, 1959	County of Westchester	27,829.60
272 shares common stock	American Telephone & Telegraph Company.	46,274.00
$16,000.00 face amount 4¼% bonds of April 15, 1972.	City of New York	16,840.00

10. During the calendar year 1933 petitioner sold the securities above described on the dates and for the sales prices set out below:

Date	Quantity	Security	Sales price
December 22, 1933	$16,000.00 face amount 4¼% bonds of April 15, 1972.	City of New York	$12,900.00
December 26, 1933	$20,000.00 face amount 4½% bonds of January 1, 1953.	Federal Land Bank (Louisville.)	16,475.00
December 26, 1933.	272 shares common stock	American Telephone & Telegraph Company.	29,635.57
December 28, 1933	$37,000.00 face amount 4½% bonds of May 1, 1942.	Federal Land Bank (St. Paul).	32,143.75
December 28, 1933	$25,000.00 face amount 4¼% bonds of June 1, 1950.	County of Westchester	19,341.48
December 28, 1933	$25,000.00 face amount 4¼% bonds of June 1, 1959.	County of Westcheste	17,968.75

11. In her income tax return for the calendar year 1933 petitioner reported as capital losses on the aforesaid sales the amounts set out below:

Quantity	Security	Amount used as basis in return	Amounts claimed as capital losses
$16,000.00 face amount 4¼% bonds of April 15, 1972.	City of New York	$16,860.00	$3,960.00
$20,000.00 face amount 4½% bonds of January 1, 1953.	Federal Land Bank (Louisville)	20,075.00	3,600.00
84 272 shares common stock	American Telephone & Telegraph Company.	46,750.00	17,114.43
$37,000.00 face amount 4½% bonds of May 1, 1942.	Federal Land Bank (St. Paul)	37,046.25	4,902.50
$25,000.00 face amount 4¼% bonds of June 1, 1950.	County of Westchester	27,180.00	7,838.82
$25,000.00 face amount 4¼% bonds of June 1, 1959.	County of Westchester	27,822.50	9,853.75

The amounts used by the petitioner as the bases of the Federal Land Bank bonds were the amounts which petitioner claimed to be the fair market values thereof on August 26, 1924, the date she attained her twenty-eighth birthday. The amounts used as the bases of the other securities were the amounts which petitioner claimed as the fair market values thereof on August 26, 1931, the date she attained her thirty-fifth birthday.

12. The Commissioner of Internal Revenue in his notice of deficiency held that the petitioner sustained capital losses on the sale of said securities as follows:

85 Quantity	Security	Amount used by Commissioner as the basis	Amount determined and allowed by Commissioner as a capital loss
$16,000.00 face amount 4¼% bonds of April 15, 1972.	City of New York	$16,180.00	$3,280.00
$20,000.00 face amount 4½% bonds of January 1, 1953.	Federal Land Bank (Louisville)	20,100.00	3,625.00
272 shares common stock	American Telephone & Telegraph Company.	36,002.02	6,366.45
$37,000.00 face amount 4½% bonds of May 1, 1942.	Federal Land Bank (St. Paul)	37,462.50	5,318.75
$25,000.00 face amount 4¼% bonds of June 1, 1950.	County of Westchester	25,768.75	6,427.27
$25,000.00 face amount 4¼% bonds of June 1, 1959.	County of Westchester	25,901.25	7,932.50

The amounts used by the Commissioner in his notice of deficiency as the bases of the aforesaid securities were the respective costs thereof to the trustees.

86 III

13. On May 16, 1915, the date of the death of petitioner's father, the latter was the owner among other securities of the following stocks which on the date of his death had fair market values as follows:

Quantity	Security	Value
500 shares common stock	The Atchison, Topeka & Santa Fe Railway Company	$49,625.00
300 shares common stock	Northern Pacific Railway Company	31,200.00

14. On July 1, 1921, the executors transferred of record and delivered to the trustees of the trust provided for in "Article Twenty-First (B)" of petitioner's father's will 100 of said 500 shares of the common capital stock of The Atchison, Topeka & Santa Fe Railway Company and 60 of said 300 shares of the common capital stock of the Northern Pacific Railway Company. Thereupon the trustees deposited in the safe deposit vault referred to in paragraph 5 hereof the certificates in the names of the trustees, representing said shares. On July 1, 1921, said shares had the following market values:

Quantity	Security	Fair market value
100 shares common stock	The Atchison, Topeka & Santa Fe Railway Company	$8,050.00
60 shares common stock	Northern Pacific Railway Company	4,170.00

87 15. Thereafter on March 2, 1925, the trustees purchased 40 additional shares of the common stock of Northern Pacific Railway Company for $2,777.00.

16. The Atchison, Topeka & Santa Fe Railway Company issued to its common stockholders of record on January 27, 1928, warrants entitling them to obtain one additional share of common stock of that company at $100.00 per share for each 25 shares then held by them. Accordingly on February 15, 1928 said trustees received a warrant entitling them to obtain 4 additional shares of said common stock. The rights embodied in said warrant were exercised by the trustees on April 16, 1928, and they obtained for $400.00 in cash 4 additional shares of said common stock of The Atchison, Topeka & Santa Fe Railway Company. At the time said rights were issued the respective values of the stock and rights were as follows:

The stock per share	$189.625
Each right (25 rights being necessary to obtain one new share)	3.6875

17. Upon petitioner attaining the age of thirty-five years on August 26, 1931, the trustees, pursuant to the will, transferred of record and delivered to her on that date certain securities including the 104 shares of common capital stock of The Atchison, Topeka & Santa Fe Railway Company and the 160 shares of the common capital stock of the Northern Pacific Railway Company obtained as hereinbefore set out. On August 26, 1931, said stocks had the following fair market values:

Quantity	Security	Total value
104 shares common stock	The Atchison, Topeka & Santa Fe Railway Company	$14,027.00
100 shares common stock	Northern Pacific Railway Company	3,312.50

88 18. On November 29, 1933, petitioner sold said 104 shares of The Atchison, Topeka & Santa Fe Railway Company stock for $4,784.54 and said 100 shares of Northern Pacific Railway Company stock for $1,943.00.

19. In her income tax return for the calendar year 1933 petitioner claimed as capital losses on the sales of the above mentioned securities the following:

Quantity	Security	Amount claimed as basis	Amount claimed as capital loss
104 shares common stock	The Atchison, Topeka & Santa Fe Railway Company	$14,248.00	$9,463.46
100 shares common stock	Northern Pacific Railway Company	3,312.50	1,369.50

The amount used as the bases of said stocks are the amounts which petitioner claimed were the fair market values of said stocks on August 26, 1931, her thirty-fifth birthday.

20. In his notice of deficiency the Commissioner of Internal Revenue determined that petitioner's capital losses on the sale of said securities were as follows:

Quantity	Security	Amount used by the Commissioner as the basis	Amount determined and allowed by Commissioner as capital loss
104 shares common stock	The Atchison, Topeka & Santa Fe Railway Company	$8,450.00	$3,665.46
100 shares common stock	Northern Pacific Railway Company	6,947.00	5,004.00

89 The amount used by the Commissioner as the basis of The Atchison, Topeka & Santa Fe Railway stock was the fair market value on July 1, 1921, of 100 shares of said stock plus the cost to the trustees of the four additional shares purchased on April 16, 1928. The amount used by the Commissioner as the basis of the 100 shares of stock of the Northern Pacific Railway Company was the amount determined by the Commissioner as the fair market value on July 1, 1921, of the sixty shares of said stock plus the cost to the trustees of the 40 additional shares purchased on March 2, 1925.

IV

21. On May 16, 1915, the date of the death of petitioner's father, the latter was the owner among other securities of the following, which on that date had fair market values as set out below:

Quantity	Security	Unit value	Total fair market value
3,000 shares common stock	United States Steel Corporation.	$52.50	$157,500.00
$50,000.00 face amount 4½% bonds of March 1, 1963.	City of New York	105.375	52,687.50
$50,000.00 face amount 4¼% bonds of September 1, 1960.	City of New York	100.75	50,375.00
627 shares common stock	Southern Pacific Company	87.375	54,784.12

90 22. On July 1, 1921, petitioner's father's executors transferred of record and delivered to the trustees of the trust provided for in "Article Twenty-first (B)" of his will out of the securities mentioned in paragraph 21 the following securities, which on July 1, 1921 had the fair market values set out below:

Quantity	Security	Unit value	Total value
600 shares common stock	United States Steel Corporation.	$74.50	$44,700.00
$10,000.00 face amount 4½% bonds on March 1, 1963.	City of New York	88.75	8,875.00
$10,000.00 face amount 4¼% bonds of September 1, 1960.	City of New York	83.75	8,375.00
125 shares common stock	Southern Pacific Company	74.375	9,296.88

Thereupon the trustees deposited in the safe deposit vault referred to in paragraph 5 hereof, said bonds and the certificates in the names of the trustees, representing said shares of United States Steel Corporation and Southern Pacific Company.

23. When the petitioner attained the age of twenty-eight years on August 26, 1924, the trustees, pursuant to the will, transferred of record and delivered to her on that date the 600 shares

91 of the common capital stock of the United States Steel Corporation and the $10,000.00 face amount 4½% bonds of March 1, 1963, o fthe City of New York. On that date the said securities had the fair market values set out below:

Quantity	Security	Unit value	Fair market value
600 shares common stock	United States Steel Corporation.	$109.00	$65,400.00
$10,000.00 face 4½% bonds of March 1, 1963	City of New York	106.625	10,662.50

24. On or about June 1, 1927 petitioner received a 40% stock dividend consisting of 240 shares of the common stock of the United States Steel Corporation on the 600 shares of common stock of said corporation which had been received by her as set out in paragraph 23 hereof.

25. Thereafter and on February 27, 1929, petitioner purchased 160 additional shares of the common capital stock of the United States Steel Corporation for $30,295.00 in cash. Later, on June 7, 1929, petitioner purchased 142 additional shares of said stock for $19,880.00 in cash.

26. When petitioner attained her thirty-fifth birthday on August 26, 1931, the trustees of the aforementioned trust, pursuant to the will, transferred of record and delivered to her on that date, among other securities, the $10,000.00 face amount 4¼% bonds of September 1, 1960 of the City of New York and 125 shares of Southern Pacific Railway Company stock hereinbefore mentioned. On August 26, 1931, said securities had the fair market values set out below:

92 Quantity	Security	Fair market value
$10,000.00 face amount 4¼% bonds of September 1, 1960.	City of New York	$10,487.50
125 shares common stock	Southern Pacific Company	9,039.06

27. During the calendar year 1933 petitioner sold the securities above described on the dates and for the sales prices hereinafter stated:

Date	Quantity	Security	Sales price
November 29, 1933	1,142 shares common stock	United States Steel Corporation.	$48,890.67
November 29, 1933	100 shares common stock	Southern Pacific Company.	1,855.50
December 4, 1933	25 shares common stock	Southern Pacific Company.	451.37
December 21, 1933	$10,000.00 face amount 4¼% bonds of September 1, 1960.	City of New York	8,037.50
December 23, 1933	$10,000.00 face amount 4½% bonds of March 1, 1963.	City of New York	8,487.50

93 28. In her income tax return for the calendar year 1933 petitioner claimed as capital losses on the above sales the amounts set out below:

Quantity	Security	Amount used as basis	Amount claimed as capital loss
1,142 shares common stock	United States Steel Corporation.	$115,500.00	$66,600.33
$10,000.00 face amount 4½% bonds of March 1, 1963.	City of New York	10,100.00	1,612.50
$10,000.00 face amount 4¼% bonds of September 1, 1960.	City of New York	10,468.75	2,431.25
125 shares common stock	Southern Pacific Company	9,156.25	6,849.38

The amount claimed as the basis of the 1,142 shares of common stock of the United States Steel Corporation was the aggregate of $65,325.00 claimed by the petitioner as the value on August 26, 1924, of 600 shares of said stock and the $50,175.00 expended by her on the purchase, as stated in paragraph 25 hereof, of 302 additional shares of such stock. The amount claimed by
94 the petitioner as the basis of the $10,000.00 face amount of the 4½% bonds of March 1, 1963, of the City of New York was the amount claimed by the petitioner to be the fair market value thereof on August 26, 1924. The amount used by the petitioner as the basis of the $10,000.00 face amount 4¼% bonds of September 1, 1960, of the City of New York was the amount claimed by the petitioner to be the fair market value thereof on August 26, 1931. The amount claimed by the petitioner as the basis of the 125 shares of common stock of the Southern Pacific Company was the amount claimed by the petitioner to be the fair market value thereof on August 26, 1931.

29. The Commissioner in his notice of deficiency determined that petitioner sustained capital losses on the sale of such securities as follows:

Quantity	Security	Amount used by Commissioner as basis	Amount determined and allowed by Commissioner as capital loss
1,142 shares common stock	United States Steel Corporation.	$94,875.00	$45,975.33
$10,000.00 face amount 4½% bonds of March 1, 1963.	City of New York	10,537.50	2,050.00
95 $10,000.00 face amount 4¼% bonds of September 1, 1960.	City of New York	10,075.00	2,037.50
125 shares common stock	Southern Pacific Company	9,296.88	6,990.01

The amount used by the Commissioner as the basis of the 1,142 shares of stock of United States Steel Corporation was the aggregate of $44,700.00 held by him to be the value on July 1, 1921, of 600 shares of said stock and $50,175.00 expended by petitioner on the purchase, as stated in paragraph 25 hereof, of the 302 additional shares of such stock. The amounts used by the Commissioner as the bases of the $10,000.00 face amount of the bonds of the City of New York (4½'s of March 1, 1963), of the $10,000.00 face amount of bonds of the City of New York (4¼'s of September 1, 1960) and of 125 shares of the common stock of the Southern Pacific Company were the amounts held by the Commissioner to be the respective fair market values thereof on July 1, 1921.

V

30. The executors of the will of Seymour H. Knox, deceased, petitioner's father, purchased the following securities on the dates and for the purchase prices hereinafter stated:

Date	Quantity	Security	Purchase price
July 1, 1916	$250,000.00 face amount 4% bonds of July 1, 1946.	City of Philadelphia	$253,437.50
March 4, 1918	$100,000.00 face amount 4½% bonds of January 15, 1933.	City of Rochester	100,412.50

96 31. On July 1, 1921, the executors transferred of record and delivered to the trustees of the trust provided for in "Article Twenty-first (B)" of petitioner's father's will, out of the bonds described in paragraph 30 hereof, the following which on July 1, 1921, had the fair market values set out below:

Quantity	Security	Fair market value
$30,000.00 face amount 4% bonds of July 1, 1946	City of Philadelphia	$50,687.50
$20,000.00 face amount 4½% bonds of January 15, 1933	City of Rochester	20,082.50

Thereupon the trustees deposited said bonds in the safe deposit vault referred to in paragraph 5 hereof.

32. When petitioner attained the age of twenty-eight years on August 26, 1924, the bonds described in paragraph 31 hereof, pursuant to the will, were on that date transferred of record and de-

livered by the trustees to the petitioner. On August 26, 1924, said bonds had the following fair market values:

Quantity	Security	Fair market value
$50,000.00 face amount 4% bonds of July 1, 1946	City of Philadelphia	$48,502.22
97 $20,000.00 face amount 4½% bonds of January 15, 1933.	City of Rochester	20,714.32

33. On November 24, 1933 petitioner sold said bonds of the face amount of $50,000 of the City of Philadelphia (4's of July 1, 1946) for $42,406.25.

34. On January 15, 1933, said bonds of the face amount of $20,000 of the City of Rochester (4½'s of January 15, 1933) matured and become payable and on June 14, 1933, petitioner received on the redemption of said bonds of the City of Rochester the sum of $20,000.

35. In her income tax return for the calender year 1933 petitioner claimed as capital losses on the above bonds the following:

Quantity	Security	Amount claimed as basis	Amount claimed as capital loss
$50,000.00 face amount 4% bonds of July 1, 1946.	City of Philadelphia	$51,480.00	$9,073.75
$20,000.00 face amount 4½% bonds of January 15, 1933.	City of Rochester	20,974.00	974.00

98 The amounts claimed by the petitioner as the bases of said bonds were the amounts which she claimed as the fair market values thereof on the date she attained her twenty-eighth birthday.

36. The Commissioner of Internal Revenue in his notice of deficiency determined that petitioner sustained capital losses with respect to said bonds as follows:

Quantity	Security	Amount used by Commissioner as the basis	Amount determined and allowed by Commissioner as capital loss
$50,000.00 face amount 4% bonds of July 1, 1946.	City of Philadelphia	$50,687.50	$8,281.25
$20,000.00 face amount 4½% bonds of January 15, 1933.	City of Rochester	20,082.50	82.50

The amounts used by the Commissioner as the bases of said bonds were the fair market values thereof on July 1, 1921.

VI

37. Some time prior to June 15, 1925, the executors of the will of petitioner's father purchased 1,068 shares of the common stock of Niagara, Lockport & Ontario Power Company at a cost of $22,642.88. On June 15, 1925, the executors transferred of record and delivered 214 of said shares of common stock of the Niagara, Lockport & Ontario Power Company to the trustees of the trust provided for in "Article Twenty-first (B)" of the petitioner's father's will. Thereupon the trustees deposited in the safe deposit vault referred to in paragraph 5 hereof, the certificates in the names of the trustees, representing said shares. Said 214 shares of the Niagara, Lockport & Ontario Power Company stock had a fair market value on June 15, 1925, of $76.00 per share or an aggregate value of $16,264.00.

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38. On August 1, 1925, the trustees exchanged the 214 shares of common stock of Niagara, Lockport & Ontario Power Company for 267½ shares of the $1.60 preferred stock and 267½ shares of the common stock without par value of Buffalo, Niagara & Eastern Power Corporation. Said exchange was non-taxable under Section 203 (b) (2) of the Revenue Act of 1924 and Section 112 (b) (3) of the Revenue Act of 1932. On the date of said exchange the fair market value of the common stock of Buffalo, Niagara & Eastern Power Corporation was $42.375 per share and the fair market value of the $1.60 preferred stock of said corporation was $24.375 per share.

39. On August 28, 1925, the trustees purchased 32½ additional shares of the common stock of Buffalo, Niagara & Eastern Power Corporation for $1,202.50 cash. On the same date the trustees purchased 32½ additional shares of the $1.60 preferred stock of the par value of $25.00 per share of Buffalo, Niagara & Eastern Power Corporation for $780.25 cash. On January 3, 1928, the trustees purchased 75 shares of the Class A stock of Buffalo, Niagara & Eastern Power Corporation for $1,500.00 cash.

100

40. On August 19, 1929, the trustees exchanged said 300 shares of the common stock of Buffalo, Niagara & Eastern Power Corporation for 1,200 shares of the common capital stock of Niagara Hudson Power Corporation and 300 Niagara Hudson Power Corporation option warrants. On the same date the trustees exchanged the 75 shares of Class A stock of Buffalo, Niagara & Eastern Power Corporation for 300 shares of the common capital stock and 75 option warrants of the Niagara Hudson Power Corporation. Said exchanges were non-taxable transactions under Sections 112 (b) (5) of the Revenue Acts of 1928 and 1932.

41. On August 19, 1929, the fair market values of the common stock and Class A option warrants of Niagara Hudson Power Corporation were $26.75 per share and $9.00 per warrant, respectively.

42. Upon petitioner attaining the age of thirty-five years on August 26, 1931, the trustees pursuant to the will, transferred of record and delivered to petitioner on that date the 267½ shares and 32½ shares of $1.60 preferred stock of Buffalo, Niagara & Eastern Power Corporation received by the trustees as stated in paragraphs 38 and 39 hereof, and the 1,500 shares of the common capital stock and 375 option warrants of Niagara Hudson Power Corporation received by the trustees as stated in paragraph 40 hereof.

43. On August 26, 1931, said securities had the fair market values set out below:

101

Quantity	Security	Unit Value	Total Value
300 shares $1.60 preferred stock	Buffalo, Niagara & Eastern Power Corporation.	$30.875	$8,062.50
1,500 shares common stock	Niagara Hudson Power Corporation	10.4375	15,656.25
375 Class A option warrants	Niagara Hudson Power Corporation	1.8125	679.69

44. On August 8, 1932, pursuant to corporate action taken by the corporation to reduce its capital stock from 45,000,000 shares of the par value of $10.00 each to 15,000,000 shares of the par value of $15.00 each, petitioner exchanged her 1,500 shares of old common stock of Niagara Hudson Power Corporation having a par value of $10.00 each for 500 shares of the new common stock of a par value of $15.00 each of said corporation, reducing her holdings of said common stock to 500 shares. At the same time petitioner exchanged her 375 option warrants of Niagara Hudson Power Corporation for 125 option warrants of said corporation. Said exchanges were non-taxable under the provisions of Section 112 (b) (3) of the Revenue Act of 1932.

45. On December 21, 1933, petitioner sold said 500 shares of the common stock of Niagara Hudson Power Corporation for $2,394.50, said 125 option warrants of said corporation for $39.97 and said 300 shares of the $1.60 preferred stock of Buffalo, Niagara & Eastern Power Corporation for $4,750.50.

102 46. In her income tax return for the calendar year 1933 petitioner claimed as capital losses on account of the sales of said securities the amounts set out below:

Quantity	Security	Amount claimed as basis	Amount claimed as capital loss
500 shares common stock	Niagara Hudson Power Corporation	$15,572.50	$13,178.00
125 option warrants	Niagara Hudson Power Corporation	656.25	616.28
300 shares $1.60 preferred stock	Buffalo, Niagara & Eastern Power Corporation.	8,100.00	3,349.50

The amounts claimed in the return as the bases of the 500 shares common stock and 125 option warrants of Niagara Hudson Power Corporation were the amounts claimed by petitioner to be the fair market values respectively on August 26, 1931 of the 1,500 shares of the common stock of the par value of $10.00 and of the 375 option warrants of said Niagara Hudson Power Corporation from which said securities were derived. The amount claimed as the basis of the 300 shares preferred stock of Buffalo, Niagara & Eastern Power Corporation was the amount claimed by petitioner to be the fair market value thereof on August 26, 1931.

47. The Commissioner of Internal Revenue in his notice of deficiency determined that the petitioner sustained a capital loss of $3,148.30 on the sale of the 500 shares of common stock
103 and 125 option warrants of Niagara Hudson Power Corporation. In determining said amount the Commissioner held that the basis to petitioner of said securities was $5,582.77, computed as follows:

(1) That part of the cost to the executors of 214 shares of Niagara, Lockport & Ontario Power Company common stock which is allocable to 267½ shares of common stock of Buffalo, Niagara & Eastern Power Corporation (63.4831% of $4,537.06)	$2,880.27
(2) Cost to the trustees of the 32½ additional shares of the common stock of Buffalo, Niagara & Eastern Power Corporation	1,202.50
(3) Cost to the trustees of the 75 shares of Class A stock of Buffalo, Niagara & Eastern Power Corporation	1,500.00
Total	$5,582.77

In his notice of deficiency the Commissioner determined that petitioner realized a capital gain of $2,313.46 on the sale of the 300 shares of $1.60 preferred stock of Buffalo, Niagara & Eastern Power Corporation. In determining said amount Commissioner used as the basis of said stock $2,437.04 computed as follows:

(1) That part of the cost to the executors of the 214 shares of Niagara, Lockport & Ontario Power Company common stock which is allocable to 267½ shares of the $1.60 preferred stock of Buffalo, Niagara & Eastern Power Corporation (36.5169% of $4,537.06)	$1,656.79
104 (2) Cost to the trustees of the 32½ additional shares of the $1.60 preferred stock of Buffalo, Niagara & Eastern Power Corporation	780.25
Total	$2,437.04

VII

48. Upon the death of petitioner's father on May 16, 1915, he was the owner among other securities of 19,080 shares of the common stock of a par value of $100.00 per share of the F. W. Woolworth Company. On May 16, 1915, the fair market value of said stock was $101.125 per share.

49. On June 1, 1920, petitioner's father's executors received an additional 5,724 shares of said stock as a stock dividend on the 19,080 shares bringing their total holdings of said stock to 24,804 shares.

50. On July 1, 1921, the executors transferred of record and delivered 4,960 of the 24,804 shares of the common stock of F. W. Woolworth Company to the trustees of the trust provided for in "Article Twenty-first (B)" of petitioner's father's will. Thereupon the trustees deposited in the safe deposit vault referred to in paragraph 5 hereof, the certificates in the names of the trustees, representing said shares. On July 1, 1921 the fair market value of said stock was $110.00 per share or an aggregate fair market value of $545,600.00.

51. On or about May 21, 1924, the F. W. Woolworth Company increased the number of its authorized shares of common stock from 1,000,000 to 4,000,000 and reduced the par value of each share from $100.00 to $25.00. In connection therewith the
105 trustees during the month of June 1924 exchanged their holdings of 4,960 shares of the $100.00 par value common stock of F. W. Woolworth Company for 19,840 shares of the new $25.00 par value common stock of the company. Said exchange was nontaxable under Sections 203 (b) (1) and (2) of the Revenue Act of 1924 and Sections 112 (b) (2) and (3) of the Revenue Act of 1932.

52. When petitioner attained the age of twenty-eight years on August 26, 1924, the trustees, pursuant to the will, transferred of record and delivered to petitioner on that date 9,920 shares of said common stock of the F. W. Woolworth Company. On August 26, 1924, said 9,920 shares of common stock of F. W. Woolworth Company had a fair market value of $111.50 per share or a total value of $1,106,080.00.

53. On January 29, 1925, petitioner purchased 80 additional shares of the $25.00 par value common stock of F. W. Woolworth Company for $9,086.00 in cash. Subsequently on November 12, 1926, she purchased 650 additional shares of said $25.00 par value stock for $115,717.87 in cash.

54. On or about December 8, 1926, the F. W. Woolworth Company declared to its common stockholders of record on January 10, 1927, a 50% dividend payable February 1, 1927, in common stock of the company. Accordingly on February 1, 1927, the petitioner received on her then holdings of 10,650 shares of capital stock of said corporation an additional 5,325 shares.

55. On January 27, 1927, petitioner purchased 25 additional shares of the common stock of a par value of $25.00 of F. W. Woolworth Company, paying therefor $2,968.75 in cash.

106 56. On May 15, 1929, the F. W. Woolworth Company increased its authorized capital stock from $100,000,000.00, consisting of 4,000,000 shares of a par value of $25.00 per share to $200,000,000.00 consisting of 20,000,000 shares of a par value of $10.00 per share. At the same time the company offered to issue to its stockholders shares of the new $10.00 par value stock in exchange for the $25.00 par value stock then outstanding at the rate of 2½ shares of the $10.00 par value stock for each share of the $25.00 par value stock held by them.

57. Thereupon petitioner exchanged her then holdings of 16,000 shares of the $25.00 par value common stock of F. W. Woolworth Company received by her as stated in paragraphs 52 to 55, inclusive, hereof, for 40,000 shares of the $10.00 par value common capital stock of that company. Identification of said 40,000 shares as being derived from particular acquisitions at certain times and with certain bases or prices was lost on said exchange. Said exchange was nontaxable under Sections 112(b) (2) and (3) of the Revenue Acts of 1928 and 1932.

58. After the delivery to petitioner on August 26, 1924, by the trustees of 9,920 shares of the $25.00 par value stock of the F. W. Woolworth Company, as stated in paragraph 52 hereof, there remained in the hands of said trustees 9,920 shares of the stock of said company.

59. On January 29, 1925, the trustees purchased for $9,060.00 in cash 80 additional shares of the stock of a par value of $25.00 each of the F. W. Woolworth Company.

60. On December 21, 1925, the trustees sold at a profit 400 shares out of the lot of 9,920 shares remaining in their
107 hands on August 26, 1924. On the same date the trustees purchased 400 additional shares of said common stock of F. W. Woolworth Company at a cost of $83,420.00.

61. As a result of the 50% common stock dividend described in paragraph 54 hereof the trustees on February 1, 1927, received on their then holdings of 10,000 shares of the $25.00 par value common stock of F. W. Woolworth Company 5,000 additional shares of said stock, bringing their total holdings of said stock to 15,000 shares.

62. Subsequently and on or about June 18, 1929, as a result of the corporate action of F. W. Woolworth Company on May 15, 1929, in reducing the par value of its common stock from $25.00 to $10.00 and increasing its capital as stated in paragraph 56 hereof, the trustees exchanged their holdings of 15,000 shares of the $25.00 par value stock of the company for 37,500 shares of the $10.00 par value stock of said company. Said exchange was nontaxable under Sections 112 (b) (2) and (3) of the Revenue Acts of 1928

and 1932. Identification of said 37,500 shares of the par value of $10.00 each as being derived from particular acquisitions was lost in said exchange.

63. When petitioner attained her thirty-fifth birthday on August 26, 1931, the trustees, pursuant to the will, transferred of record and delivered to petitioner on that date the 37,500 shares of the common capital stock of F. W. Woolworth Company then held by them. Said shares had a fair market value on August 26, 1931, of $69.25 per share or a total value of $2,596,875.00.

64. On the following dates petitioner sold 8,500 shares out of the lot of 37,500 shares of the common stock of $10.00
108 par value of F. W. Woolworth Company received by her from the trustees as hereinbefore stated for the sales prices set out below:

Date of sale	Number of shares sold	Net sales price
December 20, 1933	2,000	$77,610.00
December 21, 1933	2,000	77,685.00
December 22, 1933	3,500	137,855.00
December 27, 1933	1,000	38,955.00
Total	8,500	$332,105.00

65. In her income tax return for the calender year 1933 petitioner claimed as capital losses $245,895.00 on the sales referred to in the preceding paragraph. In computing said amounts petitioner used as the basis of said shares $578,000.00 said sum being the amount which petitioner claimed was the fair market value on August 26, 1931, of 8,500 of the 37,500 shares received from the trustees on that date.

66. In his notice of deficiency the Commissioner of Internal Revenue held:

"An analysis of your account with the Woolworth stock shows that through the 2½ for 1 exchange in 1929, the identity of your various holdings in this stock was lost. Therefore, in accordance with article 600 (4) of Regulations 77, the 8,500 shares sold in 1933 have been held to have come from the earliest acquisitions of the stock. This adjustment, which comprises the greater portion of the increase of $565,166.99, is as follows:

109 8,500 shares value at August 26, 1931 used by you	$578,000.00
Value at July 1, 1921, of 566⅔ shares at 100[1] (represented by the 8,500 shares sold)	62,333.33
Cost overstated	$515,666.67."

[1] Typographical error. This figure should be 110.

VIII

67. Upon the death of petitioner's father on May 16, 1915, he was the owner among other securities of 500 shares of the common capital stock of Hotels Statler Company, Inc., which on the date of death had a fair market value of $20.00 per share.

68. On April 16, 1921, Hotels Statler Company, Inc., declared a 60% dividend payable on April 18, 1921, to its common stockholders of record April 14, 1921, in common stock of the company. The executors of the will of petitioner's father being the holders of said 500 shares of common stock on April 14, 1921, received thereon on or about April 18, 1921, 300 additional shares of said common stock.

69. On July 1, 1921, the executors of the will of petitioner's father transferred of record and delivered to the trustees of the trust provided for in "Article Twenty-first (B)" of the will 160 shares of said 800 shares of Hotel Statler Company, Inc., common stock. Thereupon the trustees deposited in the safe deposit vault referred to in paragraph 5 hereof, the certi-
110 ficates in the names of the trustees, representing said shares. On July 1, 1921, these 160 shares of stock had a fair market value of $75.00 per share or a total of $12,000.00.

70. When the petitioner attained the age of twenty-eight years on August 26, 1924, the trustees, pursuant to the will, transferred of record and delivered to her on that date said 160 shares of common stock of Hotels Statler Company, Inc. On August 26, 1924, said shares had a fair market value of $100.00 per share or a total of $16,000.00.

71. On December 20, 1929, Hotels Statler Company, Inc., declared a 100% dividend payable December 23, 1929, to its stockholders of record on December 20, 1929, in common stock of that company. Accordingly the petitioner being the owner of said 160 shares of common stock on December 20, 1929, received on or about December 23, 1929, thereon 160 additional shares of said common stock.

72. On December 21, 1933, petitioner sold her holdings of said 320 shares of the common capital stock of Hotels Statler Company, Inc., for $2,833.60.

73. In her income tax return for the calendar year 1933 petitioner claimed as a capital loss on said sale the sum of $6,766.40. Said amount was computed by petitioner upon a basis of $9,600.00, the amount claimed by petitioner in her income tax return to be the fair market value on August 26, 1924, of the 160 shares of the stock of Hotels Statler Company, Inc., which were delivered to her on that date by the trustees.

74. The Commissioner of Internal Revenue in his notice of deficiency determined that petitioner sustained a capital
111 loss of $9,166.40 on the sale of said shares. Said amount was computed by the Commissioner upon a basis of $12,000.00, the amount determined by the Commissioner to be the fair market value on July 1, 1921, of 160 shares of said stock.

IX

75. On September 1, 1927, the trustees of the trust provided for in "Article Twenty-first (B)" of the petitioner's father's will purchased for $1,600.00 in cash 80 shares of the common capital stock of Marine Share Corporation, a New York corporation with its principal office and place of business in Buffalo, New York.

76. On July 20, 1928, said Marine Share Corporation issued to the holders of its common stock of record on July 20, 1928, rights entitling said stockholders to obtain on or before August 31, 1928, at $30.00 per share one new share of the common stock of said corporation for each four shares held. Accordingly, immediately after July 20, 1928, said trustees received in respect of their holdings of 80 shares of the capital stock of the Marine Share Corporation a subscription warrant entitling them to obtain 20 additional shares of said common stock. On July 20, 1928, the date on which said rights were issued, Marine Share Corporation stock (ex-rights) had a fair market value of $50.75 per share or 90.625% of the total value of the shares and rights and the rights had a fair market value of $5.25 per right (four rights being necessary to obtain one new share) or 9.375% of the total value of the shares and rights.

77. On August 30, 1928, the trustees of said trust exercised all of the rights received with respect to said 80 shares of the
112 capital stock of Marine Share Corporation and obtained 20 additional shares of the common stock of said corporation, paying therefor $600.00 in cash. On August 30, 1928, the date on which said rights were exercised, Marine Share Corporation stock (ex-rights) had a fair market value of $53.50 per share or 90.105% of the total value of the shares and rights and the rights had a fair market value of $5.875 per right or 9.895% of the total value of the shares and rights.

78. Thereafter and on or about March 1, 1929, the trustees exchanged said 100 shares of the capital stock of Marine Share Corporation for 200 shares of the capital stock of Marine Union Investors, Inc. Said exchange was non-taxable under Section 112 (b) (3) of the Revenue Acts of 1928 and 1932.

79. On February 28, 1929, said trustees purchased 80 additional shares of the common capital stock of Marine Union Investors, Inc., paying therefor $32.00 per share or an aggregate purchase price of $2,560.00.

80. On June 27, 1930, pursuant to a plan and agreement which became effective on that date, the trustees exchanged the aforesaid 280 shares of the capital stock of Marine Union Investors, Inc., for 280 shares of the common stock of Niagara Share Corporation of Maryland and a stock purchase warrant entitling them at any time on or before March 1, 1933, to subscribe for 28 shares of the common stock of said corporation at $32.00 per share. Said exchange was non-taxable under the provisions of Sections 112 (b) (3) of the Revenue Acts of 1928 and 1932.

81. On June 27, 1930, the 280 shares of common stock of Niagara Share Corporation of Maryland had a fair market
113 value of $14.00 per share and the 28 rights to subscribe to the common stock of said corporation had a fair market value of $4.00 each.

82. When petitioner attained her thirty-fifth birthday on August 26, 1931, the trustees, pursuant to the will, transferred of record and delivered to petitioner on that date the aforesaid 280 shares of common stock and the stock purchase warrant mentioned in paragraph 80 hereof. On August 26, 1931, the aggregate fair market values of said stock and rights were $1,820.00 and $12.25, respectively.

83. On January 28, 1931, petitioner purchased individually 620 shares of the common capital stock of Niagara Share Corporation of Maryland and a stock purchase warrant entitling her at any time on or before March 1, 1933, to subscribe for 30 shares of the common stock of said corporation at $30.00 per share, paying for said shares $4,725.02 and for said warrant $26.25.

84. On or about May 14, 1932, the Niagara Share Corporation of Maryland was recapitalized and its capital stock reduced by the issuance of one share of Class B common stock in exchange for each five shares of the common stock theretofore issued and outstanding.

85. The petitioner thereafter received certificates for 124 shares of the Class B common stock of the Niagara Share Corporation of Maryland in exchange for and in cancellation of the certificates representing the 620 shares of the common stock of said corporation purchased by her as stated in paragraph 83 hereof, and certificates for 56 shares of the Class B common stock
114 of Niagara Share Corporation of Maryland in exchange for and in cancellation of the certificates representing the

280 shares of the common stock of said corporation received by her as stated in paragraph 82 hereof, and stock purchase warrants held by the petitioner entitling her to subscribe on or before March 1, 1933, for 58 shares of the common stock of Niagara Share Corporation of Maryland at $32.00 per share were changed into and became warrants entitling her to subscribe on or before March 1, 1933, for 11⅗ shares of Class B common stock of Niagara Share Corporation of Maryland at $160.00 per share. Said exchange was non-taxable under the provisions of sections 112 (b) (2) and (3) of the Revenue Act of 1932.

86. On or about July 15, 1932, petitioner received a certificate representing 4½ shares of the Class B common stock of Niagara Share Corporation as a stock dividend on the aforesaid 180 shares of the Class B common stock of that corporation. Of said 4½ shares, 3¾₀ shares were with respect to the lot of 124 shares and 1¹⁶⁄₄₀ shares were with respect to the lot of 56 shares referred to in paragraph 85 hereof.

87. Until March 1, 1933, petitioner continued to own said warrants of Niagara Share Corporation of Maryland as aforesaid which on said date entitled her to subscribe for 11⅗ shares of the Class B common stock of the Niagara Share Corporation of Maryland at $160.00 per share. On March 1, 1933, the said warrants and the rights represented thereby expired by their terms without having been exercised, sold, or otherwise disposed of.

88. On December 22, 1933, petitioner sold for $490.88 the 184 full shares of Class B common stock of Niagara Share
115 Corporation of Maryland received by her as stated in paragraphs 85 and 86 hereof.

89. In her income tax return for the calendar year 1933 petitioner reported the sale of said 184 full shares and also erroneously reported the sale of the one-half of a full share and claimed a capital loss thereon and an ordinary loss on the expiration of the warrants as follows:

Quantity	Security	Amount claimed as basis	Amount claimed as loss
184½ shares Class B common stock....	Niagara Share Corporation of Maryland.	$6,510.02	[1] $6,019.14
Warrants (entitling purchase of 11⅗ shares at $160.00 per share).	Niagara Share Corporation of Maryland.	124.25	[2] 124.25

[1] Capital loss.
[2] Ordinary loss.

The amount of $6,510.02 claimed as the basis of the 184½ shares of Class B common stock of Niagara Share Corporation of Maryland was the $4,725.02 cost to petitioner of the 620 shares of the common stock of Niagara Share Corporation of Maryland plus

$1,785.00 claimed by petitioner to be the fair market value on August 26, 1931, of the 280 of said shares received by her on that date from the trustees. The amount of $124.25 claimed as the basis of the warrants or rights was the $26.25 cost to petitioner of the warrants in respect of 30 shares plus $98.00 claimed
116 by the petitioner to be the fair market value on August 26, 1931, of the warrant in respect of 28 shares received by her on that date from the trustees.

90. In his notice of deficiency the Commissioner determined that the petitioner sustained a capital loss of $8,994.14 on the sale of the Niagara Share Corporation stock using as the basis of such stock $9,485.02, the same representing the cost to the petitioner of $4,725.02 for the 620 shares purchased by her, plus $4,760.00 the cost to the trustees of 280 shares delivered to petitioner on August 26, 1931. In said notice of deficiency the Commissioner disallowed all of the loss claimed by the petitioner on the warrant in respect of 28 shares received by the petitioner from the trustees on August 26, 1931, and allowed an ordinary loss of $26.25 on the warrant in respect of 30 shares purchased by petitioner on January 28, 1931.

X

91. The petitioner during the calendar year 1933 made contributions to organizations of the kind specified in Section 23 (n) of the Revenue Act of 1932 in the amount of $3,380.00. In the notice of deficiency the Commissioner allowed said $3,380.00 as a deduction.

* * * * *

92. The executors of the last will and testament of petitioner's father, Seymour H. Knox, deceased, and the trustees of the trust created under "Article Twenty-first (B)" of petitioner's father's will, complied with the provisions of said will and the requirements of the laws of the State of New York with respect to distributions of income, including accumulated income.

117 93. The executors, the trustees and the petitioner at all times kept their respective books of account and filed their respective tax returns on a cash receipts and disbursements basis.

RALPH M. ANDREWS,
Counsel for Petitioner.

(Signed) J. P. WENCHEL,
Y.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

118 *Exhibit A annexed to stipulation of facts*

LAST WILL AND TESTAMENT OF SEYMOUR H. KNOX

DATED MAY 12TH, 1915

LAST WILL AND TESTAMENT OF SEYMOUR H. KNOX

I, Seymour H. Knox, of the City of Buffalo, County of Erie, and State of New York, being of sound mind and memory, do hereby make, publish, and declare this my last Will and Testament, in manner following, that is to say: .

ARTICLE FIRST. I direct my executors, hereinafter named, to pay all my lawful debts and funeral expenses. I direct my executors, hereinafter named, to pay from the funds in my estate any transfer tax or taxes, or any collateral inheritance, succession, or legacy tax or taxes imposed by law at the time of my death, upon any and all property, or interest therein, passing under and by virtue of the terms of this my last Will and Testament, and I will and direct that all gifts, bequests, and devises herein mentioned shall be paid at the net amount herein stated without any deduction on account of any such tax or taxes.

119 ARTICLE SECOND. I hereby authorize and direct my executors, hereinafter named, to cause to be erected in Forest Lawn Cemetery, in the City of Buffalo, N. Y., a suitable monument or mausoleum at an expense of not exceeding Fifty thousand dollars ($50,000) therefor, to be paid from the funds of my estate.

ARTICLE THIRD. I give and devise unto my wife, Grace M. Knox, the house, stable, land, and premises and their appurtenances, situate on the easterly side of Delaware Avenue between Utica and Ferry Streets in the City of Buffalo, and now occupied by my wife and myself as a residence; to have and to hold the same unto my said wife, Grace M. Knox, and to her heirs and assigns forever.

I also give and bequeath unto my said wife, Grace M. Knox, all the pictures, furniture, rugs, books, ornaments, tableware, plate, silver, linen, and all other household furniture and equipment, all jewelry and clothing, and also all horses, carriages, automobiles, and stable and automobile equipment owned by me at the time of my death (excepting only trotting-bred horses, sulkies, harnesses and other equipment hereinafter mentioned and referred to in Article Eighth hereof).

ARTICLE FOURTH. I also give and bequeath unto my wife, Grace M. Knox, the sum of Two hundred fifty thousand dollars ($250,000) and I will and direct that said legacy be paid to my said wife in securities owned by me at the time of my death to be selected by her and taken by her at their appraised value.

ARTICLE FIFTH. I give and bequeath to my brother, Burtis L. Knox, now residing at Chaffee, Erie County, N. Y., fifty
120 (50) shares of the common capital stock of F. W. Woolworth Company, a corporation organized under the laws of the State of New York; and in addition thereto, I give and bequeath to my said brother, Burtis L. Knox, an annuity of Twelve hundred ($1,200) and direct my executors hereinafter named to pay over said annuity to my said brother in quarterly payments of Three hundred dollars ($300) each during his natural life. I direct my said executors to set aside the sum of Thirty thousand dollars ($30,000) for the purpose of producing said annuity and at the death of my said brother, I give, devise, and bequeath the property so set aside to produce said annuity unto my son, Seymour H. Knox, if he be then living; if not, to my daughters, Dorothy Knox and Marjorie Knox, to be divided between them, share and share alike.

Notwithstanding the foregoing provisions, I further will and direct that if on the 1st day of January, in the year Nineteen hundred and thirty-three, my said brother, Burtis L. Knox, shall be then living, that the annual payments to him shall then cease, and in that event I give, devise, and bequeath to said Burtis L. Knox, all of the property and estate then held to produce such income for his benefit, pursuant to the provisions of this Article Fifth of my last Will and Testament.

ARTICLE SIXTH. I give and bequeath to my brother, Henry D. Knox, of the City of Buffalo, three hundred (300) shares of the common capital stock of F. W. Woolworth Company. I make no other provision for the benefit of my said brother, Henry D. Knox, for the reason that I have during my lifetime, made other provision for his benefit.

ARTICLE SEVENTH. I give and bequeath unto Catherine Avery, cousin of my wife, who now resides at Los Angeles, Cal-
121 ifornia, One hundred (100) shares of the common capital stock of said F. W. Woolworth Company.

ARTICLE EIGHTH. I give and bequeath unto Benjamin F. White of East Aurora, five (5) of the trotting-bred horses owned by me at the time of my death; said horses to be selected by said Benjamin F. White. I also give and bequeath to said Benjamin F. White necessary harnesses for said horses so selected by him and two sulkies; said harnesses and sulkies to be selected by him from the harnesses and sulkies owned by me at the time of my death, and that the remaining trotting-bred horses, sulkies, and harnesses be sold as hereinafter provided.

ARTICLE NINTH. I give and bequeath to the Home for the Friendless, located in the City of Buffalo, N. Y., One hundred

(100) shares of the common capital stock of said F. W. Woolworth Company; and to the Charity Organization of Buffalo, one hundred (100) shares of the common capital stock of said F. W. Woolworth Company.

ARTICLE TENTH. I give and bequeath unto the Buffalo Fine Arts Academy, Five hundred (500) shares of the common capital stock of said F. W. Woolworth Company.

ARTICLE ELEVENTH. I give and bequeath to the Methodist Episcopal Church located at Russell, St. Lawrence County, N. Y., Fifty (50) shares of the common capital stock of said F. W. Woolworth Company, in trust nevertheless, for the following purposes: the said shares of stock so bequeathed to be held or sold and the proceeds invested and, from time to time, reinvested, and the net income thereon used to assist in defraying the current expenses of said church.

122 ARTICLE TWELFTH. I give and bequeath unto William T. Damon, now in my employ, the full amount due or to become due to me upon a certain mortgage made by him to me and covering property situate on the shore of Lake Erie and in the Province of Ontario, Canada, and I direct my executors to cancel and discharge said mortgage.

ARTICLE THIRTEENTH. I give and bequeath unto Bankers Trust Company of Buffalo, a corporation organized under the laws of the State of New York, and doing business in the City of Buffalo, N. Y., and to Walter P. Cook of the City of Buffalo, N. Y., Two thousand (2,000) shares of the common capital stock of said F. W. Woolworth Company, in trust nevertheless, for the following uses and purposes, to-wit:

To receive, hold and, from time to time, in their discretion, to sell the same or portions thereof, and to invest and reinvest the same, or the proceeds thereof, and to collect the rents, income, issues, and profits on the property from time to time constituting such trust fund, and to pay over the net income arising therefrom in quarterly payments, to my sister, Carrie E. Fowler, during her natural life, and at the death of my said sister, Carrie E. Fowler, I give, devise, and bequeath the property then constituting such trust fund unto such person or persons and in such proportions as shall have been in that behalf appointed in and by the terms of the last Will and Testament duly executed of my said sister, Carrie E. Fowler, and in the event that my said sister, Carrie E. Fowler, shall fail to exercise such power of appointment, then at the death of my said sister, I give, devise, and bequeath the property constituting such trust fund unto her sons, Seymour K. Fowler and Raymond P. Fowler, share and share alike. In case of the prior death of either of said sons, the

123 issue of said deceased son to take the share to which the

parent would have been entitled if living. And in case of the prior death of both Seymour K. Fowler and Raymond P. Fowler leaving no issue them surviving, I give, devise, and bequeath the property constituting said trust fund to my heirs.

Notwithstanding the foregoing provision, I further will and direct that in event that my said sister Carrie E. Fowler, is living on the 1st day of January, in the year Nineteen hundred and thirty-three, the trust hereby created for her benefit shall then terminate, and I give, devise, and bequeath to my said sister, Carrie E. Fowler, in that event, all of the property then constituting said trust fund.

ARTICLE FOURTEENTH. I give and bequeath unto my nephew, Seymour K. Fowler, son of my sister, Carrie E. Fowler, Three Hundred (300) shares of the common capital stock of said F. W. Woolworth Company.

ARTICLE FIFTEENTH. I give and bequeath unto said Bankers Trust Company of Buffalo, a corporation organized under the laws of the State of New York, and Walter P. Cooke of the City of Buffalo, N. Y., Three hundred (300) shares of the common capital stock of said F. W. Woolworth Company, in trust nevertheless, for the following uses and purposes, to wit:

To receive, hold, and, from time to time, in their discretion, to sell the same or portions thereof and to invest and reinvest the same or the proceeds thereof, and to collect the rents, income, issues, and profits on the property from time to time constituting such trust fund and to pay over the net income arising therefrom, semi-annually, unto my nephew, Raymond P. Fowler, son of my sister Carrie E. Fowler, until he shall arrive at
124 the age of twenty-five (25) years, at which time I give and bequeath one-half of said trust fund to my nephew, Raymond P. Fowler, and direct my said trustees to pay over one-half of such trust fund to him and thereafter to pay to my said nephew, Raymond P. Fowler, the net income arising from the balance of said trust fund until he shall arrive at the age of thirty (30) years, at which time, I give, devise, and bequeath the balance of said trust fund to my said nephew, Raymond P. Fowler, and direct my said trustees to transfer and convey said property then constituting said trust fund to him. In case of the death of said Raymond P. Fowler before he shall arrive at the age of thirty (30) years, I give, devise and bequeath whatever property may remain in said trust fund unto his children, if any, to be divided among them, share and share alike, and if he shall leave no children then living, I give, devise and beque. h the balance of said trust fund to his brother, Seymour K. Fowler, if he then be living; if not, I give, devise, and bequeath the balance of said trust fund to my heirs.

ARTICLE SIXTEENTH. I give and bequeath unto Bankers Trust Company of Buffalo, a corporation organized under the laws of the State of New York, doing business in Buffalo, N. Y., and Walter P. Cooke of the City of Buffalo, N. Y., Two hundred fifty (250) shares of the common capital stock of said F. W. Woolworth Company, in trust nevertheless, for the following uses and purposes, to wit:

To receive, hold, and, from time to time, in their discretion, to sell the same or portions thereof and to invest and reinvest the same or the proceeds thereof, and to collect the rents, issues, income, and profits on the property from time to time constituting such trust fund and to pay over the net income arising therefrom semiannually, unto my niece, Verona Knox, daughter of my brother, Burtis L. Knox, until she shall arrive at the age of thirty (30) years, at which time I give, devise, and bequeath the property constituting said trust fund to my said niece, Verona Knox. In case of the death of my said niece, Verona Knox, before arriving at the age of thirty (30) years, I give, devise, and bequeath the property then constituting said trust fund unto her children, if any then living, share and share alike. If she shall have no children then living, I give, devise, and bequeath said trust fund unto her sister, Ethel Knox, if she be then living; if not, then to my heirs.

ARTICLE SEVENTEENTH. I give and bequeath unto the Bankers Trust Company of Buffalo, a corporation organized under the laws of the State of New York, and doing business at Buffalo, N. Y., and Walter P. Cooke of the City of Buffalo, N. Y., Two hundred fifty (250) shares of the common capital stock of said F. W. Woolworth Company, in trust nevertheless, for the following uses and purposes, to wit:

To receive, hold and, from time to time, in their discretion, to sell the same or portions thereof and to invest and reinvest the same or the proceeds thereof, and to collect the rents, incomes, issues, and profits on the property, from time to time constituting such trust fund and to pay over the net income arising therefrom semiannually, unto my niece, Ethel Knox, daughter of my brother, Burtis L. Knox, until she shall arrive at the age of thirty (30) years, at which time I give, devise, and bequeath the property constituting said trust fund to my said niece, Ethel Knox. In case of the death of my said niece, Ethel Knox, before arriving at the age of thirty (30) years, I give, devise, and bequeath the property constituting said trust fund unto her children, if any, share and share alike. If she shall have no children then living, I give, devise, and bequeath said trust fund unto her sister, Verona Knox, if she be then living; if not, then to my heirs.

ARTICLE EIGHTEENTH. I give and bequeath unto each of the children of my brother, Henry D. Knox, who may be living at the time of my death One hundred (100) shares of the common capital stock of said F. W. Woolworth Company.

ARTICLE NINETEENTH. I give and bequeath unto each household servant employed in or about my homes at Buffalo and East Aurora, including chauffeurs and stable employes, who have been in my employ at the time of my death for upwards of one (1) year, the sum of One hundred dollars ($100) to each such servant for each and every year of such continuous employment prior to the date of my death, and I will and direct that the determination of my executors as to who is entitled to receive the legacy under this Article of my last Will and Testament and the period of employment of each such person, and the amount of the legacy hereunder which each is to receive, shall be final and conclusive and binding upon all parties.

ARTICLE TWENTIETH. I give and devise unto my son, Seymour H. Knox, the real property constituting my farm and summer home located at East Aurora, N. Y., together with the residence and all barns and other buildings and structures situate thereon and all stable and farming equipment used or purchased for use in connection with the same.

ARTICLE TWENTY-FIRST. In determining the amount of my residuary estate for the purpose of making distribution
127 thereof as hereinafter provided, I direct that there be first set aside the following property, to wit:

All the shares of the capital stock owned by me at the time of my death in the following corporations: The Marine National Bank of Buffalo, a banking corporation having its principal place of business in the City of Buffalo, N. Y.; Bankers Trust Company of Buffalo, a corporation organized under the laws of the State of New York, having its principal place of business in the City of Buffalo, N. Y.; The Central National Bank of Buffalo, a banking corporation having its principal place of business in the City of Buffalo, N. Y.; Bankers Trust Company, a corporation organized under the laws of the State of New York, having its principal place of business in the City of New York, N. Y.; Irving National Bank, a corporation having its principal place of business in the City of New York, N. Y.; The Chase National Bank, a corporation having its principal place of business in the City of New York, N. Y.; which capital stock I have by subdivision (C) of this Article numbered "Twenty-first" of this my last Will and Testament, given and bequeathed to my brother, Henry D. Knox and Walter P. Cooke, in trust, for the benefit of my son, Seymour H. Knox.

All the rest, residue, and remainder of my property and estate, real, personal, and mixed, of every name, nature, and description, and wheresoever situate, but not including, however, the shares of the capital stock of the six corporations mentioned in the first paragraph of this Article Twenty-first of my last Will and Testament, I give, devise, and bequeath as follows:

(A) Forty (40) percent thereof (not including, however,
128 the shares of the capital stock of the six corporations mentioned in the first paragraph of this Article Twenty-first), I give, devise, and bequeath unto my brother Henry D. Knox and Walter P. Cooke, both of the City of Buffalo, N. Y., in trust nevertheless, for the following uses and purposes, to wit:

To receive, hold and from time to time, invest and reinvest the same, and to collect the rents, income, issues, and profits on the property from time to time constituting such trust fund and to pay over the net income arising therefrom quarterly unto my wife, Grace M. Knox, for and during the term of her natural life. At the death of my said wife, I give, devise, and bequeath one-half (½) of the property then constituting said trust fund unto such person or persons, corporation or corporations, and in such proportions as shall have been in that behalf appointed in the last Will and Testament, duly executed, of my said wife, Grace M. Knox; the remaining one-half (½) of the property constituting said trust fund, and in case my said wife shall have failed to exercise the power of appointment in reference to one-half (½) of said trust fund above mentioned, the entire property then constituting said trust fund, I will and direct shall be divided into three (3) equal parts or portions; one part or portion to be held by my said trustees for the benefit of my daughter, Dorothy Knox, and the net income thereon paid over to her semiannually, until she shall arrive at the age of thirty (30) years, at which time I give, devise, and bequeath said part or portion to my said daughter, Dorothy Knox; one part or portion to be held by my said trustees for the benefit of my son, Seymour H. Knox, and the net income thereon paid over to him semiannually, until he shall arrive at the age of thirty (30) years, at which time I
129 give, devise, and bequeath said part or portion to my said son, Seymour H. Knox; one part or portion to be held by my said trustees for the benefit of my daughter, Marjorie Knox, and the net income thereon paid over to her, semiannually, until she shall arrive at the age of thirty (30) years, at which time I give, devise, and bequeath said part or portion to my said daughter, Marjorie Knox. In case of the death of either or any of my said children before reaching the age of thirty (30) years, I give, devise, and bequeath the trust fund so held for the benefit

of either or any of my said children, unto the issue of such deceased child or children, share and share alike, and in case either or any of my said children shall die before reaching the age of thirty (30) years leaving no issue surviving, then I give, devise, and bequeath the property constituting said trust fund so held for the benefit of such deceased child or children unto my children who may then be living, to be divided between them share and share alike.

In the event that at the time of the death of my said wife, Grace M. Knox, any or all of my children shall be less than twenty-one (21) years of age, I direct that only so much of the income payable to such child or children, shall be used for the support and education of such childo r children as my trustees shall deem wise and proper and that the remainder of said income shall be accumulated during the minority of such child or children and paid over when each such child arrives at the age of twenty-one (21) years.

(B) Twenty (20) percent of all the rest, residue, and remainder of my said estate (not including, however, the shares of the capital stock of the six corporations mentioned in the first paragraph of this Article Twenty-first) I give, devise, and bequeath to my brother Henry D. Knox and Walter P. Cooke, both of the City of Buffalo, in trust nevertheless, for the following uses and purposes, to wit:

130 To receive, hold, and, from time to time, invest and reinvest the same, and to collect the rents, income, issues and profits on the property from time to time constituting such trust fund and to pay over so much of the net income arising therefrom, as to my trustees shall seem wise and proper toward the support, maintenance, and education of my daughter, Dorothy Knox, until she shall arrive at the age of twenty-one (21) years, and to accumulate the balance of the income during her minority for her benefit, and to pay over such accumulated income to her when she shall arrive at the age of twenty-one (21) years, and thereafter to pay over the entire net income to my said daughter, Dorothy Knox, until she shall arrive at the age of twenty-eight (28) years, at which time I give, devise, and bequeath to my said daughter, Dorothy Knox, one-half (½) of the property then constituting said trust fund and I direct my said executors to pay over to my daughter, Dorothy Knox, the net income on the remaining one-half (½) of said trust fund until she shall arrive at the age of thirty-five (35) years, at which time I give, devise, and bequeath the remaining part of said trust fund to my said daughter, Dorothy Knox, and to her heirs and assigns forever.

In the event that my said daughter, Dorothy Knox, shall die before reaching the age of thirty-five (35) years, I give, devise,

and bequeath any part or portion of said trust fund, which has not then been paid over to her, or to the possession of which at the time of her death she was not entitled, unto the issue of said Dorothy Knox, if any, surviving her, to be divided among them, share and share alike. In case there be no issue her surviving, then I give, devise, and bequeath said trust fund unto her heirs.

(C) Twenty (20) percent of said rest, residue, and remainder of my property and estate, I give, devise, and bequeath
131 unto my brother, Henry D. Knox and Walter P. Cooke, both of the City of Buffalo, N. Y., together with all of the capital stock owned by me at the time of my death in the following corporations, to wit: The Marine National Bank of Buffalo, a banking corporation having its principal place of business in the City of Buffalo, N. Y.; Bankers Trust Company of Buffalo, a corporation organized under the laws of the State of New York, having its principal place of business in the City of Buffalo, N. Y.; The Central National Bank of Buffalo, a banking corporation having its principal place of business at Buffalo, N. Y.; Bankers Trust Company, a corporation organized under the laws of the State of New York, having its principal place of business in the City of New York, N. Y.; Irving National Bank, a corporation having its principal place of business in the City of New York, N. Y.; and The Chase National Bank, a corporation having its principal place of business in the City of New York, N. Y., in trust nevertheless, for the following uses and purposes, to wit:

To receive, hold and, from time to time, invest and reinvest the same, and to collect the rents, income, issues, and profits on the property from time to time constituting said trust fund and to pay over so much of the net income thereon as to my said trustees shall seem wise and proper toward the support, maintenance, and education of my son, Seymour H. Knox, until he shall arrive at the age of twenty-one (21) years, and to accumulate the balance of the income during his minority for his benefit, and to pay over such accumulated income to him when he shall arrive at the age of twenty-one (21) years, and thereafter to pay over the entire net income on said trust fund until he shall arrive at the age of twenty-five (25) years, at which time, I give,
132 devise, and bequeath to my said son, Seymour H. Knox, a portion of said trust fund, to wit, Five hundred thousand dollars ($500,000), and direct my executors to pay over said sum of Five hundred thousand dollars ($500,000) to my said son, Seymour H. Knox, and thereafter to pay over the net income on the trust fund remaining in their hands to my said son until he shall arrive at the age of thirty (30) years, at which time I give, devise and bequeath one-half (½) of the trust fund then

remaining in the hands of my said trustees to my said son, Seymour H. Knox, and I direct my said trustees to transfer and convey the same to him and thereafter to pay over the net income arising on the trust fund remaining in their hands to my said son, Seymour H. Knox, until he shall arrive at the age of thirty-five (35) years, at which time I give, devise, and bequeath the balance of said trust fund unto my said son, Seymour H. Knox. In case of the death of my said son, Seymour H. Knox, prior to the time when he shall arrive at the age of thirty-five (35) years, I give, devise, and bequeath all of said trust fund which may not then have been paid over to him, or to the possession of which he may not at the time of his death have been entitled, unto his issue, if any, him surviving, to be divided among them, share and share alike. And in the event that there be no issue him surviving, I give, devise, and bequeath the balance of said trust fund unto his heirs.

(D) Twenty (20) per cent of all the rest, residue, and remainder of my estate (not including, however, the shares of capital stock of the six corporations mentioned in the first paragraph of this Article Twenty-first) I give, devise, and bequeath to my brother, Henry D. Knox and Walter P. Cooke, both of the City of Buffalo, in trust nevertheless, for the following uses and purposes, to wit:

133 To receive, hold and, from time to time, invest and reinvest the same, and to collect the rents, income, issues, and profits on the property from time to time constituting such trust fund and to pay over so much of the net income arising therefrom, as to my said trustees shall seem wise and proper toward the support, maintenance, and education of my daughter, Marjorie Knox, until she shall arrive at the age of twenty-one (21) years, and to accumulate the balance of the income during her minority for her benefit, and to pay over the accumulated income to her when she shall arrive at the age of twenty-one (21) years, and thereafter to pay over the entire net income to my said daughter, Marjorie Knox, until she shall arrive at the age of twenty-eight (28) years, at which time, I give, devise, and bequeath to my said daughter, Marjorie Knox, one-half (½) of the property then constituting said trust fund and I direct my said trustees to pay over the net income on the remaining one-half (½) of said trust fund until she shall arrive at the age of thirty-five (35) years, at which time I give, devise, and bequeath the remaining part of said trust fund to my said daughter, Marjorie Knox, and to her heirs and assigns forever.

In the event that my said daughter, Marjorie Knox, shall die before reaching the age of thirty-five (35) years, I give, devise, and bequeath any part or portion of said trust fund, which has

not then been paid over to her, or to the possession of which at the time of her death she was not entitled, unto the issue of said Marjorie Knox, if any, surviving her, to be divided among them, share and share alike. And in case there be no issue her surviving, then I give, devise, and bequeath said trust fund unto her heirs.

ARTICLE TWENTY-SECOND. I hereby grant unto the trustees of the various trusts created by this my last Will and Testa-
134 ment, with the same force and effect as though these provisions were repeated separately in respect to each of said trusts, full power and authority to invest and, from time to time, reinvest all of the property and funds coming into the hands of my various trustees, in such property, stock, bonds, and other securities, as to the trustees of each said trust shall seem wise and proper, whether or not such investments shall be those, which, under the laws of the State of New York, an executor and trustee is permitted to make, and without regard to limitations or restrictions, hereby giving and granting unto such trustees, full power and authority to receive from my executors and to retain as a part of the trust funds in their hands any and all stocks, bonds, or other securities, which may form a part of my estate at the time of my death, and which they shall receive from the executors thereof in the course of the distribution of my said estate, hereby granting unto my said trustees full power and authority to exchange any stocks, bonds, or other securities belonging to any trust for any stocks, bonds, or other property upon any consolidation, merger, or reorganization of any of the companies whose stocks or securities are so held by me at the time of my death, or which may form a part of any such trust fund at any time thereafter, and I hereby give and grant unto my said trustees full power and authority to sell, lease, convey, or dispose of any and all property, real, personal, or mixed, which may at any time form a part or any or all of said trust funds, and to execute leases, conveyances, and transfers thereof, on such terms and conditions as to them shall seem wise and proper.

It is my wish, however, which I hereby express to my trustees, that within five (5) years after my death the property constituting the various trusts hereby created shall be so invested that at least fifty (50) percent in value of each
135 of said trust funds shall be invested in securities then constituting legal investments for savings banks, executors, or trustees, or in unencumbered real property situate in the retail business districts of cities of at least two hundred thousand (200,000) population, unless in the opinion of my said trustees additional time is required to accomplish such investments, and

then, and in that event, I desire that such investments be made at an early date after the expiration of said five (5) years.

ARTICLE TWENTY-THIRD. In addition to the powers hereinbefore conferred upon the trustees of the various trusts created by the terms of this my last Will and Testament, I hereby grant full power and authority to my said trustees to invest portions of the trust funds of any of the trusts herein created in unencumbered real estate situate in the retail business districts of any cities in the State of New York, having a population of more than two hundred thousand (200,000), provided, however, that not more than twenty (20) per cent of the value of any trust fund shall be at any one time so invested in real property.

ARTICLE TWENTY-FOURTH. I further will and direct that in the event that I shall own any or all of the following parcels of real estate, now owned by me, at the time of my death, that the same may be transferred by my executors to the trustees of any of the trusts created by the provisions of Article Twenty-first hereof, and accepted by said trustees as a part of said trust funds at the valuations fixed by the appraisers in the proceedings for determining the amount of the transfer tax under the laws of the State of New York:

The property known as Nos. 416–418 Main Street in the City of Buffalo, N. Y.;

136 The property known as Nos. 446–448 Main Street in the City of Buffalo, N. Y.;

The property now owned by me in the City of Kansas City, Mo.;

The property now owned by me in the City of Toledo, O.;

The property now owned by me in the City of Akron, O.

It is my suggestion to my executors and trustees, although not binding in case changed conditions shall render it unwise, that the property known as Nos. 416–418 Main Street, in the City of Buffalo, N. Y., shall become a part of the trust created for the benefit of my daughter, Dorothy Knox, and that the property known as Nos. 446–448 Main Street, in the City of Buffalo, N. Y., shall become a part of the trust created for the benefit of my daughter, Marjorie Knox.

ARTICLE TWENTY-FIFTH. I hereby further authorize and empower my said executors, in the administration of my said estate to determine and make the division of my property and estate unto the various trust funds created by the provisions of Article Twenty-first hereof, as in their judgment shall seem wise and proper, and I further authorize any of my said trustees in the event of a division being necessary of any trust funds hereby created in accordance with the terms and direction of this Will, to make such division both of real and personal property, and to

execute such conveyances and transfers as may be necessary to effect the same. The action of my executors and any of said trustees, pursuant to the authority of this my last Will and Testament, to be binding upon all parties interested in my estate and in any such trust fund. I further will and direct that should any parcel of real estate owned by me at the time of my death become a part of any of the trust funds created by the terms of Article Twenty-first of this my last Will and
137 Testament, at the appraised value thereof, as hereinbefore stated, that the trustees of the remaining trusts created by the terms of said Article Twenty-first hereof, shall upon request, execute proper and suitable conveyances of their interest in said parcel or parcels of real estate, so as to effectually vest the title thereof in the trustees of the trust fund of which said parcel of real esate may become a part.

ARTICLE TWENTY-SIXTH. I hereby nominate, constitute, and appoint my wife, Grace M. Knox, to be the executrix, and my brother, Henry D. Knox, and Walter P. Cooke, both of the City of Buffalo, to be the executors, of this my last Will and Testament, hereby giving and granting to my executors, full power and authority to sell and convey any and all property, real, personal, or mixed, of which I may die seized or possessed, or in which I may have any interest. I hereby will and direct that no bond or other security shall be required of my said executors or of any of the trustees of the various trusts created by this my last Will and Testament. I hereby will and direct that my executors shall have three (3) years from and after my decease in which to settle my estate and to distribute the same in accordance with the provisions hereof, and may retain from time to time as a part of my estate any and all real property, stocks, bonds, securities, and other property, which may form a part of my estate at the time of my death, hereby granting unto my said executors full power and authority to exchange such stocks, bonds, or other securities for any other stocks, bonds, or other property upon any consolidation, merger, or other reorganization of any of the companies whose stocks or securities are so held.

I hereby authorize my executors and trustees to pay out of the income and revenues of my said estate, or of each trust
138 fund herein created, all taxes or assessments which shall be imposed or assessed upon the real or personal property belonging to my estate or to any such trust fund, all amounts necessary for insurance premiums, repairs, and generally all other expenses necessary or proper in the management or preservation of such trust funds or estate, each such trust fund bearing so far as practicable, its own burden.

I further will and direct that in view of the provisions herein contained for her benefit, that my wife, Grace M. Knox, serve as executrix of this my last Will and Testament, without fees, commissions, or compensation, and I further will and direct that in lieu of the commissions and compensation provided by law, that each of my acting executors, administrators with the will annexed or trustees, whether herein appointed or appointed by the court, excepting only the Bankers Trust Company of Buffalo, as Trustee of the various trusts created by Articles Thirteenth, Fifteenth, Sixteenth, and Seventeenth hereof, shall during his service as such, receive an annual compensation of Twelve thousand dollars ($12,000) each, to be paid out of the income of my estate and the trust funds herein contained and apportioned ratably between the said estate and the said trust funds created by the provisions of Article Twenty-first hereof in substantial proportion to the value of the property contained in each, from time to time, such sum to be received in full payment for his services as such executor, administrator and trustee under this Will, and to cover the entire services of each, both as executor, administrator, and trustee. I hereby expressly will and direct that the appointment of any other executor, trustee, or administrator with the will annexed which may be made by any court, shall be upon the express condition that every such executor, trustee, or administrator shall
at the time of his appointment, accept the compensation
139 above provided for his services, in lieu of commissions or
compensation provided by law. I will and direct that the Bankers Trust Company of Buffalo in acting as trustee of Articles Thirteenth, Fifteenth, Sixteenth, and Seventeenth hereof shall receive the usual commissions for such services as allowed by law.

Any executor or trustee however, may during the period of his administration of my estate serve as director, officer, or attorney of corporations whose stocks, bonds, or other securities may form a part of my estate, or any trust fund, and may be compensated for such service by such corporations.

ARTICLE TWENTY-SEVENTH. I hereby will and direct that any reference contained in this my last Will and Testament to my executors or to my trustees shall be deemed and construed to refer with equal force to the survivor or survivors of any of my executors or to the survivor or survivors of any trustees of any trust fund herein mentioned, and to any additional executors or trustees when their appointment is effected. And I hereby nominate, constitute, and appoint my son, Seymour H. Knox, to be one of the executors of this my last Will and Testament and one of the trustees of every trust herein created upon his

reaching the age of twenty-one (21) years and with the same force and effect as though he were now included as an executor and as a trustee of each of the trusts hereby created, and subject to the same provisions as to compensation as herein provided for my executors, other than my wife and the Bankers Trust Company of Buffalo.

ARTICLE TWENTY-EIGHTH. The provisions herein contained for the benefit of my said wife, Grace M. Knox, are to be
140 accepted by her in lieu of any dower or right of dower in any real property of which I may die seized or possessed, or in which I may have any interest, and are also to be received by her in lieu of any right to receive fees, commissions, or other compensation as executrix of this my last Will and Testament.

ARTICLE TWENTY-NINTH. I hereby will and direct that no one of my children shall be charged with any advance or advancements made by me to such children during my lifetime.

ARTICLE THIRTIETH. It is my desire if my executors approve, that all of my trotting-bred horses, harnesses, and sulkies, used in connection therewith, owned by me at the time of my death, excepting only such as may be selected by Benjamin F. White, pursuant to the provisions of Article Eighth hereof, be sold by my executors at the Fasig-Tipton Sales in New York City.

ARTICLE THIRTY-FIRST. I will and direct that the income on the trusts created by Article Twenty-first of this will shall commence from the time of my death, and I authorize and direct my executors to make payments on account of said income in their discretion prior to the creation of the trusts, which payments shall be accepted by the beneficiaries in lieu of corresponding payments from the trustees.

ARTICLE THIRTY-SECOND. I direct that my executors be not required to file any inventory of my said estate.

I direct my executors to make, from time to time, at the request of any of the beneficiaries of any of the trusts herein cre-
141 ated, semiannual statements certified by them, showing as to each beneficiary the condition of the trust estate in which he or she is interested, and the receipts, disbursements, sales, and investments in connection therewith.

ARTICLE THIRTY-THIRD. I hereby nominate, constitute, and appoint my wife, Grace M. Knox, to be the Testamentary Guardian of my three children, Dorothy Knox, Seymour H. Knox, and Marjorie Knox.

ARTICLE THIRTY-FOURTH. In case for any reason any legacy or devise herein contained shall lapse or shall become, for any reason whatever, incapable of performance, then and in that

event, I give, devise, and bequeath such legacy and devise of real estate, in case any part of it shall consist of real estate, to my said wife, Grace M. Knox, knowing that she will, so far as possible, carry out my express desires in relation to the same.

ARTICLE THIRTY-FIFTH. I hereby revoke and forever annul any and all other will or wills and codicils thereto by me at any time made.

In witness whereof, I have hereunto set my hand and seal this twelfth day of May, in the year of our Lord one thousand nine hundred and fifteen (1915).

SEYMOUR H. KNOX. [SEAL].

The foregoing instrument, consisting of twenty-three (23) pages, was on the day of the date thereof, signed, sealed, published, and declared by the Testator therein named, as and for his last Will and Testament, in the presence of us and each
142 of us, who, at his request and in his presence and in the presence of each other, have hereunto set our names as attesting witnesses thereto.

DAN'L J. KENEFICK,
Residing at Buffalo, N. Y.
GUY WELLMAN,
Residing at Buffalo, N. Y.
CHARLES H. TAYLOR,
Residing at Buffalo, N. Y.

143 *Respondent's exhibit A*

At a Surrogate's Court held in and for the County of Erie, State of New York, at the Surrogate's Office, in the City of Buffalo, in said County, on the 24th day of May 1921.

Present: Hon. LOUIS B. HART, Surrogate.

In the matter of the Judicial Settlement of the Accounts of Grace M. Knox, Henry D. Knox, and Walter P. Cooke, as Executors of the Last Will and Testament of Seymour H. Knox, Deceased.

Grace M. Knox, Henry D. Knox, and Walter P. Cooke, as Executors of the Last Will and Testament of Seymour H. Knox, late of the City of Buffalo, in said county, deceased, having heretofore presented to this court their petition praying for a judicial settlement of their accounts as such executors, dated December 20, 1920, and this court having thereupon duly issued a citation requiring the persons interested in the estate of said deceased named in said petition to be and appear in this court on the 1st day of February 1921, at ten o'clock in the forenoon of that day and attend

the judicial settlement of the account of the said executors,
144 And satisfactory proof having been filed of the due service of said citation personally within the State on Dorothy Knox Goodyear, Seymour H. Knox, Marjorie Knox, and Grace M. Knox as appears by the affidavit of William C. Warren, Jr., verified the 7th day of January 1921, presented to and filed with this court, and said petitioners having presented to and filed with this court an instrument in writing signed by Burtis L. Knox, legatee, and a person interested in the estate of said deceased, acknowledged and approved as required by law, in which he waives the issue and service on him of a citation to attend said judicial settlement and consents to the making of this decree;

And Louis E. Desbecker, Esq., counselor at law, having been duly appointed special guardian for said Marjorie Knox, infant, by an order duly made in this proceeding by this court, and said Louis E. Desbecker having executed his written consent, to act as such special guardian, and having verified the usual affidavit of his ability to act as such special guardian and said consent and affidavit having been duly filed with said court in this proceeding, and this proceeding having been duly and regularly adjourned to this day and this day appeared the said petitioners in person and by Daniel J. Kenefick Esq., their attorney, and said Marjorie Knox having appeared by said Louis E. Desbecker, her special guardian, and by Grace M. Knox, her mother and guardian, and said Grace M. Knox, Henry D. Knox, and Walter P. Cooke as such executors having presented and filed their account, together with vouchers in support thereof, and said Louis E. Desbecker having executed his consent and recommendation in writing to the effect that the account submitted by the executors should be passed and judicially settled as filed and that this decree
145 submitted to him is in all respects satisfactory, which consent and recommendation is hereto attached and made a part of this decree.

Now on motion of Daniel J. Kenefick, Esq., attorney for said executors, and after hearing the proofs and allegations of the parties and examining said account and due deliberation having been had thereon,

I. It is ordered, adjudged, and decreed that the account of said Grace M. Knox, Henry D. Knox, and Walter P. Cooke as such executors, dated December 20, 1920, be and the same hereby is finally and judicially settled and allowed as filed and the Surrogate makes and records the following summary thereof:

The executors are debited and credited as follows:

DEBIT

With amount of Schedule A		$26, 233, 760. 31

CREDIT

With amount of Schedule B	$20, 671, 098. 49	
With amount of Schedule C	1, 172, 186. 00	
With amount of Schedule D	551, 755. 95	
With amount of Schedule E	3, 493, 406. 83	25, 888, 447. 27
		$345, 313. 04

II. And it is further ordered that out of said balance the said executors pay to Louis E. Desbecker, Esq., the said special guardian, the sum of $5,000.00 hereby awarded him in full of his compensation for services rendered in this proceeding.

146 III. And it appearing to the satisfaction of this court that the executors were authorized and directed by Article Second of the will of the testator to cause to be erected in Forest Lawn Cemetery in the City of Buffalo, N. Y., a suitable monument and mausoleum at an expense of not exceeding $50,000, and that pursuant to said authority and direction, the executors have caused to be erected in Forest Lawn Cemetery in the City of Buffalo, N. Y., a mausoleum at an expense of $25,345.83,

It is ordered, adjudged, and decreed that the action of the executors in causing said mausoleum to be erected and in expending therefor the sum of $25,345.83 be and the same hereby is ratified and approved.

IV. And it appearing to the satisfaction of this court that the testator by the Eleventh clause of his will bequeathed to the Methodist Episcopal Church located at Russell, St. Lawrence County, New York, fifty shares of the common capital stock of F. W. Woolworth Company in trust for the following purposes, the shares of stock so bequeathed to be held or sold and the proceeds invested and from time to time reinvested and the net income thereon used to assist in defraying the current expenses of said church; and that in accordance with said bequest the executors on or about the 14th day of March, 1916, transferred fifty shares of the common capital stock of the F. W. Woolworth Company to The Board of Trustees of the Methodist Episcopal Church of Russell, N. Y., upon said corporation entering into an agreement under seal to hold the same in trust for the purpose and upon the terms and conditions set forth in Article Eleventh of the will of the testator,

147 It is ordered, adjudged, and decreed that the action of the executors in transferring and delivering said stock to said corporation upon its executing said agreement, be and the same hereby is ratified and approved.

V. And it appearing that by the Fifth article of the will of the testator, he had bequeathed an annuity of $1,200 per year to his brother, Burtis L. Knox, and directed his executors to pay over said annuity to said Burtis L. Knox in quarterly payments of $300 during his natural life, and that the testator directed his executors to set aside the sum of $30,000 for the purpose of producing said annuity and that at the death of said Burtis L. Knox, the testator devised and bequeathed the property so set aside to produce said annuity to his son, Seymour H. Knox, if he be then living, if not, to his daughters, Dorothy Knox and Marjorie Knox, to be divided between them share and share alike; and that he further provided that notwithstanding the foregoing provisions in case said Burtis L. Knox should be living on the 1st day of January 1933, that in that event all the property held to provide such annuity should become the property of said Burtis L. Knox.

It is further ordered, adjudged, and decreed that said executors be and they hereby are ordered and directed to set aside $30,000 and to hold and invest the same for the purposes and upon the terms and conditions set forth in Article Fifth of the will of the testator and that such sum be deemed to have been set aside as of the death of the testator and the annual payment of $1,200 made in each year by the executors to said Burtis L. Knox shall be accepted by him with the same force and effect as though paid for the income derived from said sum of $30,000.

148 VI. The Surrogate notes that the trustees of the various trusts created by the will of the testator, including Seymour H. Knox, now of full age, have duly executed their oaths and consents to act as trustees of the several trusts, and that the same are on file in this court, and that Seymour H. Knox, having become of age has qualified as executor by executing his oath of office which is on file in this office.

VII. And it appearing from the account to the satisfaction of this court that the total amount of income received by the executors from the time of their appointment to the date of said account is $6,366,973.35, and that the expenses of administration, executors' compensation, taxes, etc., properly deductible therefrom amount to $538,912.36 leaving a net income of $5,828,860.99; and it further appearing that of said amount the sum of $1,109,896.89 represents income on the bank stock specifically bequeathed in trust for Seymour H. Knox by paragraph C of Article Twenty-first of the will of the testator; and it further appearing that the balance of the net income after deducting an annuity of $1,200 per year payable to Burtis L. Knox should be divided as follows: Grace M. Knox, 40%; Dorothy Knox Goodyear, 20%; Seymour H. Knox, 20%; and Marjorie Knox, 20%; and that during the

period embraced in this accounting the whole of said income has not been so distributed and that the said parties are entitled to interest on the undrawn portion of their distributive shares thereof as follows:

Seymour H. Knox	$141,105.49
Grace M. Knox	56,453.48
Dorothy Knox Goodyear	46,789.79
Marjorie Knox	71,335.96
Total	$315,684.72

149 which said amount, together with said sum of $1,109,896.89 payable to Seymour H. Knox as aforesaid should be deducted from said net income leaving a balance of $4,402,479.38 to be distributed as follows:

40% to Grace M. Knox	$1,760,991.75
20% to Seymour H. Knox	880,495.87
20% to Dorothy Knox Goodyear	880,495.88
20% to Marjorie Knox	880,495.88

And it further appearing that the payments on account of income during the period covered by this accounting are as follows:

Grace M. Knox	$1,319,979.39
Seymour H. Knox	669,105.66
Dorothy Knox Goodyear	449,774.67
Marjorie Knox	260,422.11

And it further appearing that during the period covered by this accounting the executors have expended certain moneys for bank stocks for Seymour H. Knox having in his behalf exercised certain rights to purchase stock coming to them by virtue of the holdings of stocks specifically bequeathed for him and that the amount of money so invested less the cash distribution of principal received by virtue of said holdings, amounts to $41,512.98, which should be deducted from income due him.

And it further appearing that the amount now due to each of said interested parties on account of income to the date of the report is as follows:

150 Grace M. Knox 40% of net income	$1,760,991.75
Interest	56,453.48
	1,817,445.23
Less amount drawn	669,105.66
Balance due	497,465.84
Seymour H. Knox 20% of net income	880,495.87
Interest on undrawn income	141,105.49
Bank dividends	1,109,896.89
	2,131,498.25
Less amount drawn	669,105.66
Balance	1,462,392.59

Less bank investments		$41,512.98
Balance due		1,420,879.61
Dorothy Knox Goodyear 20% of net income	880,495.88	
Interest on undrawn income	46,789.79	
	927,285.67	
Less amount drawn	449,774.67	
Balance due		477,511.00
Marjorie Knox 20% of net income	880,495.88	
Interest on undrawn income	71,335.96	
	951,831.84	
Less amount drawn	260,422.11	
Balance due		691,409.73

Respondent's Exhibit A.

151 It is further ordered, adjudged, and decreed that the executors pay to Grace M. Knox, Seymour H. Knox, Dorothy Knox Goodyear, and Marjorie Knox, the above-mentioned balances in full of all unpaid income and interest thereon due to the date of this accounting and that up to the sum of $477,511, being the lowest amount of said income payments due, the executors pay the same by transferring and delivering to the parties entitled thereto bonds belonging to the estate at their appraised value or cost, and that the balance of said amounts be paid in cash or at the election of the parties entitled to receive said payments in securities at their appraised value or cost, but at no lesser value than present market.

And it is further ordered, adjudged, and decreed that the above balance of $691,409.73 directed to be paid to Marjorie Knox be paid to Henry D. Knox, Walter P. Cooke, and Seymour H. Knox as Trustees for Marjorie Knox, and that the same be paid $477,511 in bonds and the balance in cash or securities as hereinabove directed.

VIII. And it appearing to the satisfaction of this Court that the sales, purchases, and exchanges of properties and securities made by executors during the period embraced by this account were in accordance with the authority vested in them by the will of the testator, and were also to the best interest of said estate and the persons interested therein.

It is ordered, adjudged, and decreed that the action of the executors in making the various exchanges, purchases, and sales of properties and securities as set forth in said account be and the same hereby are ratified and approved.

152 IX. And it is further ordered, adjudged, and decreed that all payments of income made by the executors or herein directed to be made by them, shall be construed to be and shall be accepted by the various interested parties as payments of income on account of their respective interests in the estate and in the trusts created for their benefit with the same force and effect as though paid to them by the Trustees named in said Last Will and Testament of Seymour H. Knox, deceased, and said trustees shall be and they hereby are relieved and exonerated from paying to the said interested parties any income on said trusts funds from the period covered by said account.

X. And it appearing by Article Twenty-fourth of the will of the testator that it was the wish of the testator that the property known as 416–418 Main Street in the City of Buffalo, New York, should become a part of the trust created for the benefit of Dorothy Knox Goodyear, and that the property known as 446–448 Main Street, Buffalo, N. Y., should become a part of the trust created for the benefit of Marjorie Knox,

It is ordered, adjudged, and decreed that the executors transfer and convey to Henry D. Knox, Walter P. Cooke, and Seymour H. Knox, as Trustees for the benefit of Dorothy Knox Goodyear, pursuant to the provisions of paragraph B of Article Twenty-first of said will said property known as 416–418 Main Street in the City of Buffalo, New York, at the value of $414,000, being the appraised value thereof.

And it is further ordered, adjudged, and decreed that the executors transfer and convey to Henry D. Knox, Walter
153 P. Cooke, and Seymour H. Knox as trustees for the benefit of Marjorie Knox, pursuant to the provisions of paragraph D of Article Twenty-first of said will said property known as 446–448 Main Street in the City of Buffalo, N. Y., at the value of $464,439.89, being the appraised value of said property plus the cost of improvements made by the executors.

XI. It is further ordered, adjudged, and decreed that the executors in their discretion distribute the balance of the real estate in their hands at the appraised value of the several parcels between the trusts created for the benefit of Grace M. Knox by the provisions of paragraph A of Article Twenty-first of the will of the testator and the trust created for the benefit of Seymour H. Knox pursuant to the provisions of Paragraph C of Article Twenty-first of the will of the testator.

And is it further ordered, adjudged, and decreed that the executors on conveying the real estate to the various trusts or so much as they may determine to convey to the trusts, shall concurrently therewith transfer to the trustees of each of said four

trusts, sufficient securities belonging to the estate at their appraised value or cost to equalize the difference in the value of the parcel or parcels of real estate received by each of said trusts, to the end that the appraised value of such real estate and such securities so transferred to equalize such value shall be equal as to each of such trusts except that the trust created for the benefit of Grace M. Knox shall be twice the amount of either of the others.

XII. And it appearing further that the testator by the provisions of Article Twenty-fifth of his said will has authorized and empowered his executors in the administration
154 of his said estate to determine and make division of his property and estate among the various trust funds created by the provisions of Article Twenty-first thereof as in their judgment shall seem wise and proper.

It is further ordered, adjudged, and decreed that the executors shall from time to time as in their judgment seems wise and proper, make division of the property and estate remaining in their hands, or so much thereof as from time to time they think wise, after making provision for carrying out the terms and conditions of this decree into the various trust funds created by the provisions of said last will and testament and in accordance with the terms thereof, any balance of cash or property remaining in the hands of the executors to be subject to the payment therefrom of any further debts or obligations of the testator and the expenses of administration and final distribution in accordance with the terms of said will.

And it is further ordered, adjudged, and decreed, that from and after the creation of said trust funds the executors and trustees may in their discretion apportion the expenses of administration and the other disbursements among the four trusts hereinbefore mentioned and the estate, so long as any portion of said estate remains undivided.

The Surrogate notes that the executors have this day filed in this court receipts and releases duly executed by the following named legatees showing full payment of the several specific bequests to them contained in the will of the testator: Henry D. Knox, Burtis L. Knox, Catherine Avery, The Home of the Friendless, the Charity Organization Society of Buffalo,
155 Buffalo Fine Arts Academy, William T. Damon, Seymour K. Fowler, Sherman Damon, Charles Knowlton, Bertha L. Daigler, Lucy Kranichfeld, Margaret Reilly, Benjamin F. White, (2) Paul J. Kingston, John Thoman, William Timm, Herman Timm, Edward Kingston, Louis Sissler, Charles Curtis, Charles Sissler, Aloise Burghardt; also receipt and release duly executed by Henry D. Knox, General Guardian of Priscilla

Knox, Alice Knox, and James H. Knox, showing full payment of the specific bequests to them contained in the will of the testator; also receipts and releases duly executed by Bankers Trust Company of Buffalo and Walter P. Cooke, as trustees, showing the receipt by them of the property bequeathed in trust by the will of the testator for Verona Knox, Ethel Knox, Carrie D. Fowler and Raymond P. Fowler; also receipt and release executed by the Board of Trustees of the Methodist Episcopal Church of Russell, N. Y., showing the receipt of the property specifically bequeathed in trust by the will of the testator, together with an agreement executed by the Board of Trustees of the Methodist Episcopal Church of Russell, N. Y., to hold said property in trust in accordance with the terms of the will of the testator.

L. B. HART, *Surrogate.*

STATE OF NEW YORK,
County of Erie, Surrogate's Office, ss:

I, George T. Vandermeulen, Clerk of the Surrogate's Court of the said county of Erie, do hereby certify that I have compared the foregoing and annexed copy of Decree—in the matter
156 of the judicial settlement of the accounts of Grace M. Knox, Henry D. Knox and Walter P. Cooke, as executors of the Last Will and Testament of Seymour H. Knox, deceased with the original record thereof now remaining in this office, and have found the same to be a correct transcript therefrom, and of the whole of such original record.

[SEAL]

In witness whereof, I have hereunto set my hand and affixed the seal of said Surrogate's Court, at Buffalo, N. Y., this 12th day of December 1938.

No. 53273.

G. T. VANDERMEULEN,
Clerk of Surrogate's Court.

[Surrogate's Court, Erie County. In the Matter of the Judicial Settlement of the Accounts of Grace M. Knox and others as executors of vs. Seymour H. Knox, Deceased. Decree.]

157 Before United States Board of Tax Appeals

Docket No. 84640

[Same title.]

R. M. Andrews, Esq., John L. Kenefick, Esq., and Ernest J. Brown, Esq., for the petitioner. W. H. Schwatka, Esq., and E. L. Updike, Esq., for the respondent.

Memorandum opinion

MURDOCK. The Commissioner determined a deficiency of $65,542.60 in income tax of the petitioner for the calendar year 1933. The only question for decision is the basis for gain or loss in the hands of the petitioner of securities which were distributed to her in accordance with a trust established for her under the will of her father. The Board adopts as its findings of fact the stipulation filed by the parties, together with the respondent's exhibit A.

Seymour H. Knox, the father of the petitioner, died on May 16, 1915. His will provided that the residuary estate should be divided into four parts and that one part, consisting of 20 percent of the whole, be placed in trust for this petitioner. The will provided, with respect to the portion placed in trust for this petitioner, that it was so placed for the following uses and purposes:

"To receive, hold and, from time to time, invest and reinvest the same, and to collect the rents, income, issues, and profits
158 on the property from time to time constituting such trust fund and to pay over so much of the net income arising therefrom, as to my trustees shall seem wise and proper toward the support, maintenance, and education of my daughter, Dorothy Knox, until she shall arrive at the age of twenty-one (21) years, and to accumulate the balance of the income during her minority for her benefit, and to pay over such accumulated income to her when she shall arrive at the age of twenty-one (21) years, and thereafter to pay over the entire net income to my said daughter, Dorothy Knox, until she shall arrive at the age of twenty-eight (28) years, at which time I give, devise, and bequeath to my said daughter, Dorothy Knox, one-half (½) of the property then constituting said trust fund and I direct my said executors to pay over to my daughter, Dorothy Knox, the net income on the remaining one-half (½) of said trust fund until she shall arrive at the age of thirty-five (35) years, at which time I give, devise, and bequeath the remaining part of said trust fund to my said daughter, Dorothy Knox, and to her heirs and assigns forever.

"In the event that my said daughter, Dorothy Knox, shall die before reaching the age of thirty-five (35) years, I give, devise, and bequeath any part or portion of said trust fund, which has not then been paid over to her, or to the possession of which at the time of her death she was not entitled, unto the issue of said Dorothy Knox, if any, surviving her, to be divided among them,

share and share alike. In case there be no issue her surviving, then I give, devise, and bequeath said trust fund unto her heirs."

It further provided that the trustees should have full power to sell, exchange, or dispose of any property in the trust
159 fund, and expressed the wish of the testator that within five years after his death, or as soon thereafter as possible, 50 percent of the value of the trust fund should be invested in securities constituting legal investments for executors or trustees or in unencumbered real property.

The petitioner attained the age of twenty-eight years on August 26, 1924, and on that day received a distribution in accordance with the terms of the trust created by the will, and she reached her thirty-fifth birthday on August 26, 1931, at which time she received an additional distribution in accordance with the trust created by the will of her father. She had a number of transactions in the taxable year involving securities which she received in the two distributions, some of which were securities purchased by the trustees, some were securities purchased by the executors, and some were securities owned by her father at the date of his death. She contends that her basis in every instance is the fair market value of those securities on the date of distribution, whereas the respondent contends that her basis is cost to the executors or trustees, fair market value at the date the property was transferred from the executors to the trustees, or fair market value at the date of the decedent's death, depending upon when the securities were originally acquired.

The question of whether the petitioner is entitled to use as her basis for gain or loss the fair market value of the property at the time it was distributed to her is decided for the petitioner on authority of Marjorie K. Campbell, 39 B. T. A. No. 133 (5/19/39) and cases there cited. The trusts in the two cases were created by the same will and are substantially identical.

Decision will be entered under Rule 50.

Enter:

Entered May 19, 1939.

160 Before United States Board of Tax Appeals

Docket No. 84640

[Same title.]

Decision

The respondent on June 13, 1939, filed a proposed computation pursuant to the Board's Memorandum Opinion entered May 19, 1939. The petitioner on June 23, 1939, filed a notice of acqui-

escence to the respondent's computation. Therefore, it is ordered and decided, that there is no deficiency in income tax for the year 1933.

(Signed) J. E. MURDOCK,
Member, United States Board of Tax Appeals.

Enter:
Entered June 30, 1939.

161 In United States Circuit Court of Appeals for the Second Circuit

BTA Docket No. 84640

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER ON REVIEW

vs.

DOROTHY K. G. ROGERS, RESPONDENT ON REVIEW

Petition for review and assignments of error

Filed Sept. 22, 1939

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Now comes Guy T. Helvering, Commissioner of Internal Revenue, by his Attorneys, Samuel O. Clark, Jr., Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and Claude R. Marshall, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I

JURISDICTION

That the petitioner on review (hereinafter referred to as the Commissioner) is the duly appointed, qualified, and acting Commissioner of Internal Revenue, appointed and holding his
162 office by virtue of the laws of the United States; that Dorothy K. G. Rogers, the respondent on review (hereinafter sometimes referred to as the taxpayer) is an individual residing at Buffalo, New York; that the said Dorothy K. G. Rogers filed her Federal individual income tax return for the taxable year 1933 in the office of the Collector of Internal Revenue for the Twenty-eighth District of New York, located at Buffalo, New York, which said collection district is within the jurisdiction of

the United States Circuit Court of Appeals for the Second Circuit.

The Commissioner seeks a review of the decision of the United States Board of Tax Appeals by virtue of the provisions of the Revenue Act of 1926, Sections 1001–1005, c. 27, 44 Stat. 9, as amended by the Revenue Act of 1928, Section 603, c. 852, 45 Stat. 873, and further amended by the Revenue Act of 1932, Section 1101, c. 209, 47 Stat. 169, and as further amended by the Revenue Act of 1934, Section 519, c. 277, 48 Stat. 680, and subsequent revenue acts.

II

PRIOR PROCEEDINGS

On February 27, 1936, the Commissioner of Internal Revenue, pursuant to the provisions of Section 272 (a) of the Revenue Act of 1932, as amended by Section 501 of the Revenue Act of 1934 (49 Stat. 755) sent the taxpayer by registered mail a notice of deficiency advising her that the determination of her income tax liability for the taxable year 1933 disclosed a deficiency in the amount of $65,549.60. Thereafter on May 25, 1936, a petition was filed by the taxpayer with the United States Board of Tax Appeals requesting a redetermination of the deficiency determined in the aforesaid notice of deficiency. On July 24,
163 1936, the Commissioner filed an answer to the petition, wherein he affirmatively claimed an increased deficiency. On September 5, 1936, the taxpayer filed her reply. On December 13, 1938, the taxpayer filed a motion to file amendments to petition and on the same day lodged an "amendment of petition." The motion to amend the petition having been granted, the Commissioner on December 14, 1938, filed an answer to the amendment of petition.

This proceeding and the cases of Marjorie K. Campbell, Docket No. 84639, and Seymour H. Knox, Docket No. 77827, were heard on December 14, 1938, at Washington, D. C. On May 19, 1939, the Board entered its memorandum opinion. On June 30, 1939, the Board entered its decision ordering and deciding that there is no deficiency in tax for the year 1933.

III

NATURE OF CONTROVERSY

Seymour H. Knox, the father of the taxpayer, died on May 16, 1915. His will provided that the residuary estate should be divided into four parts and that one part, consisting of 20 per-

cent of the whole, be placed in trust for this petitioner. The will provided, with respect to the portion placed in trust for this petitioner, that it was so placed for the following uses and purposes:

"To receive, hold and, from time to time, invest and reinvest the same, and to collect the rents, income, issues, and profits on the property from time to time constituting such trust fund and to pay over so much of the net income arising there-
164 from, as to my trustees shall seem wise and proper toward the support, maintenance, and education of my daughter, Dorothy Knox, until she shall arrive at the age of twenty-one (21) years, and to accumulate the balance of the income during her minority for her benefit, and to pay over such accumulated income to her when she shall arrive at the age of twenty-one (21) years, and thereafter to pay over the entire net income to my said daughter Dorothy Knox, until she shall arrive at the age of twenty-eight (28) years, at which time I give, devise, and bequeath to my said daughter, Dorothy Knox, one-half (½) of the property then constituting said trust fund and I direct my said executors to pay over to my daughter, Dorothy Knox, the net income on the remaining one-half (½) of said trust fund until she shall arrive at the age of thirty-five (35) years, at which time I give, devise, and bequeath the remaining part of said trust fund to my said daughter, Dorothy Knox, and to heirs and assigns forever.

"In the event that my said daughter, Dorothy Knox, shall die before reaching the age of thirty-five (35) years, I give, devise, and bequeath any part or portion of said trust fund, which has not then been paid over to her, or to the possession of which at the time of her death she was not entitled, unto the issue of said Dorothy Knox, if any, surviving her, to be divided among them, share and share alike. In case there be no issue her surviving, then I give, devise, and bequeath said trust fund unto her heirs."

The will further provided that the trustees should have full power to sell, exchange, or dispose of any property in the trust fund, and expressed the wish of the testator that within
165 five years after his death, or as soon thereafter as possible, 50 percent of the value of the trust fund should be invested in securities constituting legal investments for executors or trustees or in unencumbered real property.

The trust was formally set up on July 1, 1921, and the property provided by the will was transferred of record and delivered to the trustees.

The taxpayer attained the age of twenty-eight on August 26, 1924, and on that date the trustees, pursuant to the will, transferred of record and delivered to the taxpayer certain securities, and on August 26, 1931, she reached her thirty-fifth birthday and on that date the trustees pursuant to the will, transferred of record and delivered to the taxpayer certain securities. She had a number of transactions in the taxable year involving certain of the securities transferred and delivered to her by the trustees aforesaid, some of which were securities purchased by the trustees, some were securities purchased by the executors, and some were securities owned by her father at the date of his death. She contended that in accordance with the third sentence of Section 113 (a) (5) of the Revenue Act of 1932, her basis in every instance for determining gain or loss on the disposition of said property is the fair market value of these securities on the date of delivery to her by the trustees.

The securities sold in 1933 involve the following:

(1) $16,000 face amount 4¼% bonds of April 15, 1972, City of New York. $20,000 face amount 4½% bonds of January 1, 1953, of the Federal Land Bank (Louisville). $37,000 face amount 4½% bonds of May 1, 1942, of the Federal Land Bank
166 (St. Paul). $25,000 face amount 4¼% bonds of June 1, 1950, of the County of Westchester. $25,000 face amount 4¼% bonds of June 1, 1959, of the County of Westchester. 272 shares common stock of American Telephone & Telegraph Company.

(2) 104 shares common stock of The Atchison, Topeka & Santa Fe Railway Co. 100 shares common stock of Northern Pacific Railway Company.

(3) 1,142 shares common stock of U. S. Steel Corporation. 100 shares common stock of Southern Pacific Company. 25 shares common stock of Southern Pacific Company. $10,000 face amount 4¼% bonds of Sept. 1, 1960, of the City of New York. $10,000 face amount 4½% bonds 1963 of the City of New York.

(4) $50,000 face amount 4% bonds of July 1, 1946, of City of Philadelphia. $20,000 face amount 4½% bonds of January 1933, of City of Rochester.

(5) 500 shares common stock of Niagara Hudson Power Corp. 125 option warrants of Niagara Hudson Power Corporation. 300 shares preferred stock of Buffalo, Niagara & Eastern Power Corporation.

167 (6) 8,500 shares common stock of F. W. Woolworth Company.

(7) 320 shares common stock of Hotels Statler Company, Inc.

(8) 184 shares Class B common stock of Niagara Share Corporation of Maryland.

The Commissioner presents that in respect to the securities purchased by the trustees the bases of such securities to the taxpayer were their respective cost to the trustees as provided by Section 113 (a) of the Revenue Act of 1932; that in respect to the securities purchased by the executors, that the bases to the taxpayer of such securities were their respective cost to the executors, as provided by Section 113 (a) of the Revenue Act of 1932, and, in the alternative, if Section 113 (a) (5) of said Act governs, as contended by taxpayer, then the bases to the taxpayer of such securities were their respective fair market values at the time they were formally transferred from the executors to the trustees on July 1, 1921, and not the time the securities were physically delivered to the taxpayer by the trustees. In respect to the securities owned by taxpayer's father at the date of his death, the Commissioner presents that the bases to the taxpayer of such securities were the fair market value of such securities at the time of death of taxpayer's father as provided by Section 113 (a) (4) of the Revenue Act of 1932, and in the alternative, if Section 113 (a) (5) of the Revenue Act of 1932 governs, as contended by taxpayer, the bases to the taxpayer of such securities were their fair market values at the time of their formal transfer from the executors to the trustees and not the time the securities were physically delivered to the taxpayer by the trustees.

168 The Board held that the securities were personal property acquired by will of her father and not by specific bequest, and that the third sentence of Section 113 (a) (5) of the Revenue Act of 1932 applies and not the general provisions of Section 113 (a) or Section 113 (a) (4) of said Act, and that accordingly the proper bases of the securities in the hands of the taxpayer for gain or loss are their fair market value on the respective dates physically delivered to the taxpayer by the trustees regardless whether the securities were owned by the father at the date of his death, or purchased by either the trustees or executors.

The position taken by the Board is contrary to the Bureau's position outlined in G. C. M. 14893 (1935) C. B. XIV–1, 202.

The position of the Commissioner may be summarized in respect to the securities listed above as follows: —

1. That Section 113 (a) of the Revenue Act of 1932 is applicable in determining the cost basis of securities purchased by the executors and by the testamentary trustees, which is cost to the executor and trustees, and is applicable to such securities as are listed under (1), (4), (5), and (8).

2. That Section 113 (a) (4) is applicable in determining the cost bases of securities sold by taxpayer, which cost is the value as of May 16, 1915, the date of death of taxpayer's father (of an equivalent number of shares), and is applicable to such securities as are listed under (2), (3), (6), and (7).

3. In the alternative that if Section 113 (a) (5) of the Revenue Act of 1932 is applicable, then the phrase "time of
169 distribution to the taxpayer" means the date the securities were delivered by the executors to the trustees, and the fair market value on that date is the cost basis and is applicable to such securities as are listed under (2), (3), (4), (5), (6), and (7).

Questions presented:

1. Was the taxpayer's interest "vested" or "contingent" under the laws of New York?

2. In determining gain or loss under Section 113 (a) (5) of the Revenue Act of 1932, is the meaning of the phrase "the fair market value of the property at the time of the distribution to the taxpayer" (a) the date when the executors turned over the corpus of the trust to the trustees, or (b) the date of actual delivery by the trustees to the taxpayer?

3. As to securities purchased by the trustees with trust funds (subsequent to March 1, 1913), is the basis for determining gain or loss: (a) the cost to the trustees, or (b) the fair market value on the date of delivery by the trustees to the taxpayer?

4. As to securities purchased by the executors with funds of estate (subsequent to March 1, 1913) is the basis: (a) the cost to the executors, or (b) the fair market value on the date of delivery by the trustees to the taxpayer?

5. In respect to securities owned by the taxpayer's father at the date of his death (or the equivalent number of shares then existing), is the basis for determining gain or loss: (a) the fair market value at the time of death of taxpayer's father, or (b) the fair market value on the date of delivery by the trustees to the taxpayer?

170 III

ASSIGNMENTS OF ERROR

That the Commissioner of Internal Revenue being aggrieved by the opinion and decision of the United States Board of Tax Appeals in these proceedings hereby petitions for a review of said opinion and decision by the United States Circuit Court of Appeals for the Second Circuit, and for the correction of the manifest errors which therein occurred and intervened to his prejudice.

The Commissioner's assignments of error are as follows:
The Board erred:

1. In holding and deciding that personal property delivered by trustees from the trust created by and in accordance with the will of taxpayer's father takes, as its basis for gain or loss in the hands of the taxpayer, its fair market value at the time of the delivery to the taxpayer by the trustees—regardless of whether the property was owned by the father at the time of his death, purchased by the executors, or purchased by the trustees.

2. In failing to hold and decide, where personal property was owned by taxpayer's father at the date of his death on May 16, 1915, and said property is transferred on July 1, 1921, or some other subsequent date, to a testamentary trust created by and in accordance with the will of taxpayer's father and said property is physically delivered to the said taxpayer by the trustees either on August 26, 1924, or August 26, 1931, that the basis of said property for gain or loss in the hands of the taxpayer is the fair market value of such property at the time of the death of taxpayer's father.

171 3. In failing to hold and decide, where personal property is purchased or acquired by the executors of taxpayer's father's estate and the said property is transferred on July 1, 1921, (or some other subsequent date) to a testamentary trust created by and in accordance with the will of the taxpayer's father and said property is physically delivered to the said taxpayer either on August 26, 1924, or August 26, 1931, by the trustees, that the cost basis of said property for gain or loss in the hands of the taxpayer is the same as the cost basis to the executors.

4. In failing to hold and decide, where personal property is purchased or acquired by testamentary trustees of a trust created by and in accordance with the will of taxpayer's father and said property is physically delivered to said taxpayer either on August 26, 1924, or August 26, 1931, by the trustees, that the cost basis of said property for gain or loss in the hands of the taxpayer is the same as the cost basis to the testamentary trustees.

5. In holding and deciding that the basis for determining gain or loss of the personal property herein delivered by the trustees from the trust created by and in accordance with the will of taxpayer's father is determined and governed by the third line of Section 113 (a) (5) of the Revenue Act of 1932.

6. In failing to hold and to decide that the basis for determining gain or loss of the personal property delivered by the trustees from the trust created by and in accordance with the will of taxpayer's father is determined and governed by the first sentence

of Section 113 (a) of the Revenue Act of 1932, where said property delivered by the trustees was acquired either by the trustees, or the executors before transfer to the testamentary trust.

172 7. In failing to hold and to decide that the basis for determining gain or loss of the personal property, delivered by the trustees from the trust created by and in accordance with the will of taxpayer's father is determined and governed by Section 113 (a) (4) of the Revenue Act of 1932, where said property delivered by the trustees was held by the father at the date of his death on May 16, 1915, and transferred by the executors of the father's estate to the testamentary trustees.

8. In holding and deciding that the "time of distribution to the taxpayer" within the meaning of Section 113 (a) (5) of the Revenue Act of 1932 is the date the trustees delivered the property as provided in the will to the taxpayer, to-wit, on August 26, 1924, and on August 26, 1931.

9. In failing to hold and decide that "the time of distribution to the taxpayer" within the meaning of Section 113 (a) (5) of the Revenue Act of 1932 is the date the executors transferred the property as provided in the will to the testamentary trustees for the benfit of the taxpayer.

10. In failing to hold and decide that the taxpayer realized gains and sustained losses on the disposition of the personal property physically received from the trustees on the respective dates of August 26, 1924 and August 26, 1931, measured by the difference between the sales prices and bases claimed by the Commissioner on the respective properties disposed of in 1933.

11. In that the decision of the Board is contrary to the position of the Commissioner outlined in General Counsel's Memorandum 14893 (1935) C. B. XIV–1, p. 202.

12. The Board erred in that its conclusions of law are contrary and in conflict with its findings of fact.

173 13. The Board erred in finding and determining that there is no deficiency in tax liability due from the taxpayer for the year 1933.

14. The Board erred in failing to find and determine that there is a deficiency in tax liability due from the taxpayer for the year 1933 in the amount of $90,000.00 (plus any and all additional amounts which may result from the correction of the errors set forth herein).

Wherefore, the Commissioner petitions that said findings of fact and opinion and decision of the United States Board of Tax Appeals be reviewed by the Circuit Court of Appeals for the Second Circuit; that a transcript of the record be prepared in accordance with the law and the rules of said court and be

transmitted to the Clerk of said court for filing and that appropriate action be taken to the end that the errors herein complained of may be reviewed and corrected by said court.

(Sgd.) SAMUEL O. CLARK, Jr.,
Assistant Attorney General.

(Signed) J. P. WENCHEL,
R. L. W.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
CLAUDE R. MARSHALL,
Special Attorney,
Bureau of Internal Revenue.

174 [*Duly sworn to by Claude R. Marshall; jurat omitted in printing.*]

175 In United States Circuit Court of Appeals for the Second Circuit

B. T. A. Docket No. 84640

[Same title.]

Notice of filing petition for review

Filed Sept. 30, 1939

To R. M. ANDREWS, Esq.
Marine Trust Building, Buffalo, New York.

You are hereby notified that the Commissioner of Internal Revenue did, on the 22d day of September 1939, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 22d day of September 1939.

(Signed) J. P. WENCHEL,
R. L. W.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

176 Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 25th day of September 1939.

(Sgd.) RALPH M. ANDREWS,
Counsel for Respondent on Review.

177 In United States Circuit Court of Appeals for the Second Circuit

B. T. A. Docket No. 84640

[Same title.]

Notice of filing petition for review

Filed Sept. 30, 1939

To JOHN L. KENEFICK, Esq.,
Marine Trust Building, Buffalo, New York.

You are hereby notified that the Commissioner of Internal Revenue did, on the 22d day of September 1939, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 22d day of September 1939.

(Signed) J. P. WENCHEL,
R. L. W.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

178 Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 25th day of September 1939.

(Sgd.) JOHN L. KENEFICK,
Counsel for Respondent on Review.

179 In United States Circuit Court of Appeals for the Second Circuit

B. T. A. Docket No. 84640

[Same title.]

Notice of filing petition for review

Filed Sept. 30, 1939

To DOROTHY K. G. ROGERS,
706 Marine Trust Bldg., Buffalo, New York.

You are hereby notified that the Commissioner of Internal Revenue did, on the 22d day of September 1939, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 22d day of September 1939.

(Signed) J. P. WENCHEL,
R. L. W.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

180 Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 26 day of September 1939.

(Sgd.) DOROTHY K. G. ROGERS,
Respondent on Review.

181 In United States Circuit Court of Appeals for the Second Circuit

B. T. A. Docket No. 84640

[Same title.]

Notice of filing petition for review

Filed Sept. 30, 1939

To ERNEST J. BROWN, Esq.,
Marine Trust Building, Buffalo, New York.

You are hereby notified that the Commissioner of Internal Revenue did, on the 22d day of September 1939, file with the Clerk

of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 22d day of September 1939.

(Signed) J. P. WENCHEL,
R. L. W.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

182 Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 25th day of September 1939.

(Sgd.) ERNEST J. BROWN,
Counsel for Respondent on Review.

183 In United States Circuit Court of Appeals for the Second Circuit

B. T. A. Docket No. 84640

[Same title.]

Amended praecipe for record

Filed October 21, 1939

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit, and deliver to the Clerk of the United States Circuit Court of Appeals for the Second Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Second Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of proceedings before the Board.
2. Pleadings before the Board:
(a) Petition, including annexed copy of deficiency letter.
(b) Answer.
(c) Reply.
(d) Amendments of Petition.
(e) Answer to Amendments of Petition.
(f) Reply to Answer to Amendments of Petition.

3. Stipulation of Facts and Exhibit A attached thereto.
4. Respondent's Exhibit A (Decree).
5. Memorandum opinion of the Board.
6. Decision.
184 7. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.
8. Orders enlarging time for the preparation of the evidence and for the transmission and delivery of the record.
9. This praecipe (amended).

Said transcript to be prepared, certified, and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Second Circuit.

(Signed) J. P. WENCHEL,
R. L. W.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Receipt of a copy of the above-described amended praecipe for record is acknowledged and agreed to this — day of October 1939.

(Sgd.) John L. Kenefick,
Attorney for Respondent on Review.

CRM/csl 10/17/39.
(Sgd.) RALPH M. ANDREWS,
(Sgd.) ERNEST J. BROWN,
Attorneys for Respondent on Review.
[EMBLEM]
185 [Clerk's certificate to foregoing transcript omitted in printing.]

186 In United States Circuit Court of Appeals for the Second Circuit

Nos. 41–257–258–259—October Term, 1939

(Argued February 15, 1940.—Decided June 10, 1940)

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

RICHARD VAN NEST GAMBRILL, RESPONDENT

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

MARJORIE K. CAMPBELL, RESPONDENT

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

SEYMOUR H. KNOX, RESPONDENT

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

DOROTHY K. G. ROGERS, RESPONDENT

187 Petitions by the Commissioner of Internal Revenue to review determinations of the United States Board of Tax Appeals in respect to income taxes of the respondents Gambrill and Knox for the year 1930, and of the respondents Campbell and Rogers for the year 1933. Affirmed.

Before SWAN, AUGUSTUS N. HAND, and PATTERSON, Circuit Judges.

Sewall Key, Acting Assistant Attorney General, J. L. Monarch, and Newton K. Fox, Special Assistants to the Attorney General, Counsel for the Commissioner of Internal Revenue in the proceeding against the respondent Gambrill. Samuel O. Clark, Assistant Attorney General, Sewall Key and Arthur A. Armstrong, Special Assistants to the Attorney General, Counsel for the Commissioner of Internal Revenue in the proceedings against the respondents Campbell, Knox, and Rogers. Sidney W. Davidson, Ben R. Clark, and Allin H. Pierce, Counsel for the respondent Gambrill. James McCormick Mitchell, John L. Kenefick, and Ralph M. Andrews, Counsel for the respondents Campbell, Knox, and Rogers.

188 *Opinion*

AUGUSTUS N. HAND, Circuit Judge:

The foregoing proceedings all involve the correctness of income tax assessments by the Commissioner of Internal Revenue and in each the Commissioner has appealed from decisions of the Board of Tax Appeals modifying his assessments.

In the Gambrill case the Commissioner assessed an income tax deficiency of $11,753.40 for the year 1930, while the Board of Tax Appeals determined that there was an overpayment of $75.60 by the taxpayer. In the Knox case the Commissioner assessed a deficiency for the same year of $35,645.83 while the Board determined that there was a deficiency of $42,842 (arising, however, from adjustments not here in issue). In the Campbell case the Commissioner assessed an income tax deficiency of $86,937.47 for the year 1933, and in the Rogers case a deficiency of $65,549.60 for the same year. The Board found that there was no income

tax deficiency on the part of either Campbell or Rogers. We think that its orders in all four proceedings should be affirmed.

In each of the above cases the taxpayer involved was given a remainder interest in a trust created by will. Certain personal securities that were a part of the corpus of the particular trust were delivered by the trustee to the taxpayer after the right to possession became fixed by the termination of the prior beneficial estate. Some of these securities were acquired by the testator during his lifetime, some of them were purchased by the executor after the testator's death before setting up the trust, and some were purchased by the trustee after the trust was established. Securities derived by the trustee in the various ways mentioned were delivered by him to the taxpayer and sold by the latter.

189 In assessing income taxes upon alleged profits realized by the taxpayer the Commissioner used the following bases for computing gains: In the case of securities which had been owned by the decedent, their fair market value at the time when distributed by the executor to the trustee; in the case of securities purchased by the executor or trustee, the cost to such fiduciary; in respect to certain securities purchased by a fiduciary prior to March 1, 1913, as in Gambrill's case, the value on that date, whenever cost was unknown. The Board of Tax Appeals, however, took the view that, because of the provisions of Section 113 (a) (5) of the Revenue Acts of 1928 and 1932, the proper basis in all cases was the fair market value of the securities at the "time of the distribution to the taxpayer" by the trustee, no matter when or how the trustee or the executor might have derived the particular securities.

In determining how long a taxpayer had held securities for the purpose of computing capital gain or loss under Section 101 of the Revenue Act of 1928 the Board used the dates of delivery of the securities by the trustee to the taxpayer. The Commissioner, on the other hand, used the date of the death of the testator as the beginning of the period of holding securities owned by the latter and the date of purchase by the fiduciary as the beginning in cases where securities were purchased by the executor or trustee.

We agree with the conclusion of the Board that Sections 113 (a) (5) of the Revenue Acts of 1928 and 1932 govern the computation of loss or gain in the cases before us. The pertinent provisions read as follows:

"(a) Property acquired after February 28, 1913.—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * *

90 "(5) Property Transmitted at Death.—If personal property was acquired by specific bequest, or if real property was cquired by general or specific devise or by intestacy, the basis shall e the fair market value of the property at the time of the death f the decedent. If the property was acquired by the decedent's state from the decedent, the basis in the hands of the estate hall be the fair market value of the property at the time of the eath of the decedent. In all other cases if the property was cquired either by will or by intestacy, the basis shall be the fair narket value of the property at the time of the distribution to the axpayer. In the case of property transferred in trust to pay ne income for life to or upon the order or direction of the rantor, with the right reserved to the grantor at all times rior to his death to revoke the trust, the basis of such property n the hands of the persons entitled under the terms of the rust instrument to the property after the grantor's death shall, fter such death, be the same as if the trust instrument had been will executed on the day of the grantor's death; * * *"

None of the securities involved in the cases before us were acuired "by specific bequest" or were "acquired by the decedent's state from the decedent." They were all directly acquired from estamentary trustees. Accordingly the basis was not "the fair narket value of the property at the time of the death of the ecedent." Therefore the third clause of Section 113 (a) (5) hich embraces "all other cases" of property acquired by will is ontrolling. That clause provides that: "In all other cases if ne property was acquired either by will or by intestacy, the asis shall be the fair market value of the property at the time of the distribution to the taxpayer."

91 The words "the property" in the foregoing sentence seem inevitably to relate to the particular property sold by the axpayer to whom it was distributed by the trustee. The term taxpayer" is defined by Section 701 (a) (13) of the Revenue cts of 1928 and 1932 as "any person subject to a tax imposed y this Act." It is hard to imagine language which would more learly fix the basis for computing the gain or loss realized upon ne sales of the securities with which the Commissioner had to eal than the words "fair market value of the property at the me of the distribution to the taxpayer."

Perhaps the most strenuous objection made by the Commisioner to adopting what seems to be the clear meaning of the tatute is that increment in value between the date of the ecedent's death and the time of distribution to the taxpayer not subjected to taxation when the securities are sold and nus tax resources are impaired. But it is frequently true that ncrements are not subjected to taxation. One common case

where increment in value is disregarded is that which occurs during the lifetime of an owner of securities which are not sold by him but are sold after his death by his executors, administrators, trustees, or remaindermen under his will. Such an increment accruing during the lifetime of the owner of securities has never been taken into account in computing gain or loss upon sales after his death. Increment between the date of death of the owner of securities and the date of distribution by an executor to a legatee is also to be disregarded under the third clause of Section 113 (a) (5) in the case of distribution of securities which are transmitted by virtue of a general bequest.

The supposed loss in revenue due to a disregard of fluctuations in the market value of securities between the date of death and the time of distribution is moreover somewhat fanciful, 92 for in all cases where the property depreciates in value between the date of death and the date of distribution a larger tax would result from fixing the basic value at "the time of the distribution to the taxpayer" than from fixing the basis at the time of the testator's death.

The further contention of the Commissioner that the word "taxpayer" as used in the third clause of Section 113 (a) (5) should be construed as meaning the "trustee" and that the phrase "time of the distribution to the taxpayer" ought to be interpreted as meaning "the date when the executors transferred the property to the trustees," seems to us without warrant. The taxpayers here are undoubtedly the respondents. The trustees are separate entities and as such are neither agents of the respondents nor mere passive fiduciaries. It is true that under certain circumstances they might themselves have become taxpayers in respect to the corpus of their trusts, but only in case they had made sales of some of the securities composing the corpus—not, as here, when without making any sales they wound up their trusts and distributed the corpus to remaindermen. To treat the trustee and beneficiary-remainderman, as the Commissioner wishes us to do, as a "sort of dual tax personality" is to disregard the plain language of the statute and to adopt a concept which seems to us to defy analysis. In view of the clear terms of the third clause of Section 113 (a) (5) it can make no difference whether the interest of any remaindermen be vested, vested subject to be divested, or contingent. In either event the basis should be "the fair market value at the time of the distribution to the taxpayer," i. e., to the respondent whose income taxes are being reviewed, and not to the trustee.

In respect to the securities purchased either by the executors or trustees the Commissioner says they do not come within the

third clause of Section 113 (a) (5) because they were not
193 acquired by will. This requires a most technical interpretation of the clause and one that in our opinion is not sound even technically. Any property distributed by a trustee which is part of the corpus of the trust is acquired through and by virtue of the will. Through the will the remaindermen derived all their interests and without it they would have had no standing and would have received nothing. Lyeth v. Hoey, 305 U. S. 188, 194–195.

It is further argued that the Senate Report in respect to the enactment of Section 113 (a) (5) in the 1928 Act justified the Commissioner's interpretation of the statute. In dealing with the third clause the report said: "It would also apply in cases where the executor purchases property and distributes it to the beneficiary." There is, however, no reason because of this mention of purchases by the executor for limiting the application of the report to property so purchased. In cases where a trust has been created by will the executor will often act as trustee before the trust is actually set up and sometimes will sell and purchase securities on behalf of the trust. Indeed the statement in the Senate Report would not cover the particular facts before us except in situations where the executor so acted.

The Commissioner apparently contends that the decision in Brewster v. Gage, 280 U. S. 327, fixing the date of death as the time when property should be valued under the provisions of the Revenue Act of 1921, for the purposes of computing gain or loss, affords some guide in interpreting Section 113 (a) (5). The difficulty in maintaining such a contention is that Section 113 (a) (5) is specific, that it fixes a different date for valuing acquisitions of property from that of the Act of 1921, and that the opinion in Brewster v. Gage says at page 337: "The deliberate selection of language so differing from that used in the earlier acts indicates that a change of law was intended."

In United States v. Nostrand, 94 F. (2d) 510, and Commis-
sioner v. Libbey, 100 F. (2d) 458, the Court of Appeals
194 of the First Circuit held that the basis for computing gain or loss to the taxpayer was the market value of the property at the time of distribution by the trustee to the remaindermen, and not the value at the time of distribution by the executor to the trustees. These decisions, rather than that of the Seventh Circuit in Commissioner v. Maguire rendered on March 5, 1940, are in accord with our view.

The second question is whether the securities passing to the respondents Gambrill and Knox were held by them for more than two years and hence whether any gain or loss realized by the sale was taxable not as ordinary income or loss but as a capital gain or loss because the securities were "capital assets" as defined in Section 101 (c) (8) and (B) of the Revenue Act of 1928. The Board held that they were not, and they plainly were not unless the period during which they were held by the trustees can be added to the period between the date of distribution to the taxpayers and the date of sale. There cannot be any such tacking because the property, when held by the respective respondents did not have "for the purpose of determining gain or loss from a sale * * *, the same basis * * * in his hands as it would have in the hands" of the trustees.

On behalf of the Commissioner it is argued that the decision of the Supreme Court in McFeeley v. Commissioner, 296 U. S. 102, requires us to find that the securities had been held from the date of death and that they, therefore, were held for more than two years prior to sale. That decision, however, involved an estate where there was no trust. The court only decided that the general legatee held the securities which were transferred to him by the executor from the date of death. We agree with the Board that the intervening trusts broke the continuity so that the taxpayer only held the securities from the time they were distributed to him.

195 In the Campbell case certain Woolworth stock was purchased by the taxpayer prior to distribution to her by the trustees of other shares of the same kind. If she did not hold the shares she acquired under the will until they were distributed to her by the trustee, under the "first-in-first-out" rule, her own shares should be treated as sold prior to those which were delivered to her by the trustee. We agree with the Board that her own shares must be regarded as sold first. During the time that the title to the shares remained in the trustee the taxpayer had no control over their disposition and they were not acquired until she obtained them as her own. Helvering v. San Joaquin Fruit & Investment Co., 297 U. S. 496.

The orders of the Board of Tax Appeals are affirmed.

196 In United States Circuit Court of Appeals, Second Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

DOROTHY K. G. ROGERS, RESPONDENT

Appeal from the United States Board of Tax Appeals

Judgment

Filed June 29, 1940

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

D. E. ROBERTS, *Clerk.*

197 [File indorsement omitted.]

198 [Clerk's certificate to foregoing transcript omitted in printing.]

199 Supreme Court of the United States

Order allowing certiorari

Filed November 12, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1941

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FILE COPY

Office - Supreme Court, U. S.
FILED
SEP 28 1940
CHARLES ELMORE CROPLEY
CLERK

No. 473

In the Supreme Court of the United States

OCTOBER TERM, 1940

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

RICHARD VAN DUSEN HARRISON

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

MARGUERITE K. CARPENTER

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

SEYMOUR H. KNOX

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

DOROTHY K. G. BOOTH

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	3
Statutes and regulations involved	4
Statement	4
Specification of errors to be urged	12
Reasons for granting the writs	14
Conclusion	15
Appendix	17

CITATIONS

Cases:	
Beers v. *Commissioner*, 78 F. (2d) 447, certiorari denied, 296 U. S. 620	15
Brewster v. *Gage*, 280 U. S. 327	15
Chandler v. *Field*, 63 F. (2d) 13, certiorari denied, 289 U. S. 758	15
Commissioner v. *Libbey*, 100 F. (2d) 458	14
Commissioner v. *Maguire*, 111 F. (2d) 843	14, 15
Hopkins v. *Commissioner*, 69 F. (2d) 11, certiorari denied, 293 U. S. 560	15
Jenkins v. *Smith*, 21 F. Supp. 433, reversed, 99 F. (2d) 827	14
McFeely v. *Commissioner*, 296 U. S. 102	15
Warner v. *Commissioner*, 72 F. (2d) 225, certiorari denied, 293 U. S. 620	15
Statutes:	
Revenue Act of 1928, c. 852, 45 Stat. 791:	
Sec. 101	18
Sec. 111	17
Sec. 113	17
Revenue Act of 1932, c. 209, 47 Stat. 169:	
Sec. 113	20
Miscellaneous:	
Treasury Regulations 77, promulgated under the Revenue Act of 1932, Art. 58	20

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. ——

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

RICHARD VAN NEST GAMBRILL

No. ——

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

MARJORIE K. CAMPBELL

No. ——

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

SEYMOUR H. KNOX

No. ——

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

DOROTHY K. G. ROGERS

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that writs of certiorari issue to review the judgments of the Circuit Court of Appeals for the Second Circuit entered in the above causes, affirming the decisions of the Board of Tax Appeals.

OPINIONS BELOW

The Board of Tax Appeals promulgated a separate opinion in each of these cases. (Gambrill, R. 18–31; Campbell, R. 191–200; Knox, R. 81–85; Rogers, R. 157–159.) The opinion in the Gambrill case is reported in 38 B. T. A. 981; the opinion in the Campbell case is reported in 39 B. T. A. 916, and the memorandum opinions in the other two cases are unreported.

The court below rendered one opinion in respect of all four cases, which is reported in 112 F. (2d) 530.

JURISDICTION

The judgments of the court below were entered on June 28, 1940, in the Gambrill case (R. 58–59), and on June 29, 1940, in the Campbell, Knox, and Rogers cases (Campbell, R. 235; Knox, R. 117; Rogers, R. 193). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. What is the correct basis for computing gain or loss upon the sale of securities by a distributee of a testamentary trust? Three types of securities are involved:

(a) Securities owned by the decedent at the time of death. (Presented in Gambrill, Campbell, and Rogers cases.)

(b) Securities not owned by the decedent at the time of death but purchased by the trustees. (Presented in all four cases.)

(c) Securities not owned by the decedent at time of death, but purchased by the executors and delivered to the trustees. (Presented in Campbell and Rogers cases.)

2. In computing the holding period under Section 101 of the Revenue Act of 1928 relating to capital gains and losses, is the period to be measured from the date of delivery by the trustees to the distributee, or is it to be measured from the date of the decedent's death in the case of securities of the type involved in 1 (a), *supra,* and from the date of purchase in the case of securities of the type involved in 1 (b), *supra*? (Presented in Gambrill and Knox cases.)

3. Where stock was purchased by a taxpayer prior to receipt by her from the trustees of other shares of the same kind, should the time of receipt from the trustees or the time of acquisition by the fiduciaries govern the application of the "first in, first out" rule? (Presented in Campbell case.)

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set out in the Appendix, *infra*, pp. 17–20.

STATEMENT

Gambrill case

The facts found by the Board of Tax Appeals (R. 19–25) may be summarized as follows:

On November 20, 1897, Mary Van Nest, grandmother of the taxpayer, died, leaving a will, the ninth article of which provided as follows (R. 19–20):

> NINTH: All the residue of my estate of every kind I give and devise as follows:
>
> One half thereof in equal shares to my daughters Mary Van Nest Jackson, Anna Van Nest Gambrill, and Jennie Van Nest Foster, and my granddaughter, Mary Alice Van Nest absolutely.
>
> The other half thereof in four equal shares to my executors, to hold the same in trust, one share for the benefit of each of the same four persons, to wit, my said three daughters and my said granddaughter and to receive the income and pay the same to her during her life with full power to invest and reinvest in their discretion without any limitation whatsoever and at her death to transfer and deliver the same as she if leaving issue shall by will direct or in the absence of such direction, to her issue equally, or if she shall leave no issue, then to the survivors

> of the said four persons, to wit, my said three daughters and my said granddaughter, and to the issue of any of the said four persons who may have died, the issue to take the share which the parent would have taken if living. * * *

On January 4, 1898, the executors delivered to themselves, as trustees for Anna Van Nest Gambrill, the mother of the taxpayer, certain securities of a value of $222,631.25 (R. 20–21).

On March 23, 1928, Anna Van Nest Gambrill died without having exercised the power of appointment (R. 21). The taxpayer was the sole surviving issue of his mother and was born prior to the death of his grandmother, Mary Van Nest (R. 21).

On May 5, 1928, the trustees, after settling their accounts, delivered the balance of the corpus of the trust, consisting of securities, to the taxpayer as the remainderman (R. 22). Some of the securities were part of the original trust *res* (R. 26), and others had been purchased by the trustees with trust funds, both prior to and subsequent to March 1, 1913 (R. 23–24).

In February 1930, on May 6, 1930, and in June 1930, the taxpayer sold some of those securities (R. 22–23).

The taxpayer used the fair market value as of May 5, 1928, the date the securities were delivered to him by the trustees, as the basis for computing gain or loss on the sales (R. 22). And in computing

the period during which he had held these securities, for the purpose of determining the applicability of the capital gain or loss provisions in Section 101 of the Revenue Act of 1928, taxpayer used the same date, May 5, 1928, from which to measure that period (R. 25).

The Commissioner of Internal Revenue, on the other hand, ruled that as to securities forming part of the original trust *res,* the date the executors transferred the securities to the trustees, January 4, 1898, constituted the date of "distribution to the taxpayer" (R. 12, 20, 28). As to securities purchased by the trustees out of trust funds prior to March 1, 1913, the Commissioner used the March 1, 1913, value as a basis for computing gain or loss since the cost to the trustees was unknown. As to securities purchased by the trustees subsequent to March 1, 1913, the Commissioner used the cost to the trustees as a basis for computing gain or loss (R. 12, 28).

In determining the period of holding by the taxpayer for capital gains purposes, as to securities forming part of the original trust *res,* the Commissioner used as the basic date, November 20, 1897, the date of the death of Mary Van Nest, and as to securities purchased by the trustees he used the dates of purchase (R. 25).

The Board of Tax Appeals sustained the taxpayer's position, holding that the "time of distribution" to the taxpayer under Section 113 (a) (5)

of the Revenue Act of 1928, was May 5, 1928, when the property was actually delivered by the trustees to the taxpayer, and that the fair market value of the securities on that date was to be used in computing gain or loss (R. 29). And it similarly held that May 5, 1928, was the basic date for determining the applicability of the capital gains provisions, with the consequence that the securities sold in February 1930 had not been held by the taxpayer for more than two years and were therefore not capital assets, but that the securities sold on May 6 and in June 1930 had been held by the taxpayer for more than two years and were capital assets (R. 31).

Upon appeal by the Commissioner, the court below affirmed the decision of the Board.

Campbell, Knox, and Rogers cases

The facts found by the Board of Tax Appeals (Campbell, R. 192–196; Knox, R. 81–84; Rogers, R. 157–159) may be summarized as follows:

Seymour H. Knox, father of these three taxpayers, died May 16, 1915 (Campbell, R. 192; Knox, R. 82; Rogers, R. 157). His will provided that the residuary estate should be divided into four parts and that one part, consisting of 20 percent of the whole, should be placed in trust for the taxpayer, Marjorie Knox Campbell, for the following uses and purposes (Campbell, R. 193–194):

> To receive, hold, and, from time to time, invest and reinvest the same, and to collect

the rents, income, issues and profits on the property from time to time constituting such trust fund and to pay over so much of the net income arising therefrom, as to my said trustees shall seem wise and proper toward the support, maintenance and education of my daughter, MARJORIE KNOX, until she shall arrive at the age twenty-one (21) years, and to accumulate the balance of the income during her minority for her benefit, and to pay over the accumulated income to her when she shall arrive at the age of twenty-one (21) years, and thereafter to pay over the entire net income to my said daughter, MARJORIE KNOX, until she shall arrive at the age of twenty-eight (28) years, at which time, I give, devise and bequeath to my said daughter, MARJORIE KNOX, one-half (½) of the property then constituting said trust fund and I direct my said trustees to pay over the net income on the remaining one-half (½) of said trust fund until she shall arrive at the age of thirty-five (35) years, at which time I give, devise and bequeath the remaining part of said trust fund to my said daughter, MARJORIE KNOX, and to her heirs and assigns forever.

In the event that my said daughter, MARJORIE KNOX, shall die before reaching the age of thirty-five (35) years, I give, devise and bequeath any part or portion of said trust fund, which has not then been paid over to her, or to the possession of which at the time of her death she was not en-

> titled, unto the issue of said MARJORIE KNOX, if any, surviving her, to be divided among them, share and share alike. And in case there be no issue her surviving, then I give, devise and bequeath said trust fund unto her heirs.

Another 20 percent was placed in trust for the taxpayer, Dorothy Knox Rogers, in exactly the same terms (Rogers, R. 157–159).

A third 20 percent was placed in trust for the taxpayer, Seymour H. Knox, in the same terms except that when he reached the age of 25 he was to get $500,000 of the trust fund, when he became 30 he was to get one-half of the remaining trust fund and at 35 he was to receive the balance. The income was payable to him in the meantime (Knox, R. 82–83).

The trusts were formally established on July 1, 1921, and the executors on that date transferred to the trustees the property as provided in the will (Campbell, R. 194; Rogers, R. 80).

Mrs. Campbell attained the age of 28 on July 10, 1928, and received on that date one-half of the property then constituting her trust fund. Certain of the securities which she received at that time were sold during 1933 and certain of the bonds matured and were paid during 1933. Some of the securities sold by her had been held by her father at the time of his death, others had been purchased by the executors and still others had been purchased by the trustees (Campbell, R. 194).

Mrs. Campbell owned certain shares of stock which she had purchased prior to July 10, 1928. She received from the trustees on that date additional shares of the same stock. She sold some of the shares in 1933. She applied the "first in, first out" rule in making up her return for 1933 and regarded her individual purchases as the stock first purchased, used the basis applicable to those shares until it was exhausted, and then used as the basis for the remaining shares sold the fair market value of the shares on July 10, 1928 (Campbell, R. 195–196).

Seymour Knox attained the age of 30 on September 1, 1928, and became entitled to receive and did receive on that date one-half of the trust fund then remaining in the hands of the trustees. In this connection, he received 8,575 shares of stock of Marine Share Corporation, of which 5,160 were purchased by the trustees on August 31, 1927, and 3,415 were purchased by the trustees on August 30, 1928. The fair market value of those shares was $473,768.75 on September 1, 1928. Mr. Knox exchanged those shares thereafter in a nontaxable exchange and sold the shares received in that exchange on June 10, 1930, for $287,193.67 (Knox, R. 83–84).

Mrs. Rogers became 28 on August 26, 1924, and 35 on August 26, 1931, on both of which days she received distributions in accordance with terms of the trust. She had a number of transactions in the taxable year (1933) involving securities so received

from the trustees. Some of these securities had been purchased by the trustees, some by the executors and some of them had been owned by her father at the date of his death (Rogers, R. 159).

The Commissioner took the position that the basis for determining gain or loss for securities owned by the decedent at the time of his death was the fair market values on dates of transfer from executors to trustees; in the case of securities purchased by the trustees, the cost thereof to the trustees; and, in the case of securities purchased by the executors, either cost to the executors or value at time of distribution by executors to trustees (Campbell, R. 194; Knox, R. 84; Rogers, R. 159). In computing the period of holding for the purpose of determining the applicability of the capital gains provisions in the Seymour Knox case, the Commissioner took the view that the taxpayer acquired the securities in question when the trustees purchased them (Knox, R. 84). In applying the "first in, first out" rule in the Campbell case, the Commissioner ruled that the first shares purchased were those received from the trustees since they were acquired prior to the date upon which the taxpayer had purchased her similar shares (Campbell, R. 196).

The Board ruled that the dates of delivery by trustees to the taxpayers should govern the determination of these questions, and on appeal by the Commissioner the court below affirmed.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the words "time of distribution to the taxpayer", used in Section 113 (a) (5) of the Revenue Acts of 1928 and 1932, mean the time of actual delivery by the trustees to the taxpayer-beneficiary and not the time of transfer from executors to trustees. (This assignment applies to the Gambrill, Campbell and Rogers cases.)

2. In holding that the bases for determining gain or loss on the sales here involved were values at dates of transfer from the trustees to the taxpayers, respectively. (This assignment applies to each of the instant cases.)

3. In holding that the dates of transfer from the trustees to the taxpayers should govern in determining the holding period for purposes of computing capital gains or losses under Section 101 of the Revenue Act of 1928. (This assignment applies to the Gambrill and Knox cases.)

4. In holding that the time of transfer from the trustees to the taxpayer should govern in determining when securities were acquired for purposes of applying the "first in, first out" rule. (This assignment applies to the Campbell case.)

5. In not holding as to securities owned by the decedent at time of death and transferred from the executors to the taxpayers through the trustees, that the basis for determining gain or loss is value at time of delivery from executors to trustees, or,

where such delivery was made prior to March 1, 1913, the value at time of delivery or March 1, 1913, value, whichever is greater. (This assignment applies to the Gambrill, Campbell and Rogers cases.)

6. In not holding as to securities purchased by the trustees and transferred to taxpayers, that the basis for determining gain or loss is cost to the trustees or fair market value at March 1, 1913, where purchased prior to March 1, 1913, and cost is unknown. (This assignment applies to each of the instant cases.)

7. In not holding as to securities purchased by the executors and transferred to taxpayers through the trustees, that the basis for determining gain or loss is cost to the executors, or, in the alternative, value at time of transfer from executors to trustees. (This assignment applies to the Campbell and Rogers cases.)

8. In not holding that for purposes of determining capital gains, the securities were held and acquired by the taxpayer from the dates of acquisition by the trustees, that is, date of decedent's death as to securities owned by him at death and dates of purchase as to securities purchased by trustees. (This assignment applies to the Gambrill and Knox cases.)

9. In not holding that for purposes of applying the "first in, first out" rule, the securities were held and acquired by the taxpayer from the dates of acquisition by the trustees, that is, date of decedent's

death as to securities owned by him at death and dates of purchase as to securities purchased by the trustees. (This assignment applies in the Campbell case.)

10. In affirming the decisions of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRITS

As recognized by the Circuit Court of Appeals (Gambrill, R. 57), the decision below is in conflict with *Commissioner* v. *Maguire,* 111 F. (2d) 843 (C. C. A. 7th), as to the first question presented. The Government is not opposing the taxpayer's petition for certiorari in the *Maguire* case, No. 346, present Term. The decision below is also in conflict with *Jenkins* v. *Smith,* 21 F. Supp. 433 (Conn.), reversed on other grounds, 99 F. (2d) 827 (C. C. A. 2d), but is in accord with *Commissioner* v. *Libbey,* 100 F. (2d) 458 (C. C. A. 1st), one judge dissenting.

Although the *Maguire* case dealt only with securities of the type involved in 1 (a) and 1 (b) of the questions presented herein, the reasoning of the *Maguire* decision would likewise prevent using the date of delivery by the trustees to the beneficiaries as the critical date for the securities involved in 1 (c).[1] Accordingly, if certiorari is granted here,

[1] The Government contends that as to securities falling in group (c), the basis for computing gain or loss should be cost to the executors. However, we will contend in the alternative that the basis should be value at the time of delivery by the executors to the trustees.

the writs should embrace all three types of securities.

In addition, these cases present two further questions not decided in the *Maguire* case, involving the selection of the critical date for computing the holding period for capital gains purposes, as well as for the application of the "first in first out" rule. Both questions are closely related to the main question presented, and we believe that it will be of assistance to the Court in obtaining a complete picture to have all the questions presented before it. Moreover, the decision below with respect to the holding period conflicts in principle with *McFeely* v. *Commissioner*, 296 U. S. 102.[2]

CONCLUSION

The questions here presented are important. There is a direct conflict as to the basic issue, and the other two issues are so closely interwoven with

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[2] Although the court below attempted to distinguish the *McFeely* case, we believe the distinction to be unsound, particularly in view of prior decisions by that court and other circuit courts of appeals to the effect that the rule of *Brewster* v. *Gage*, 280 U. S. 327, followed in the *McFeely* case, is not affected by the intervention of a testamentary trust. See *Warner* v. *Commissioner*, 72 F. (2d) 225 (C. C. A. 2d), certiorari denied, 293 U. S. 620; *Chandler* v. *Field*, 63 F. (2d) 13 (C. C. A. 1st), certiorari denied, 289 U. S. 758; *Hopkins* v. *Commissioner*, 69 F. (2d) 11 (C. C. A. 7th), certiorari denied, 293 U. S. 560; *Beers* v. *Commissioner*, 78 F. (2d) 447 (C. C. A. ?), certiorari denied, 296 U. S. 620.

the main issue as to call for review of all the questions presented. It is therefore respectfully submitted that this petition for writs of certiorari should be granted.

FRANCIS BIDDLE,
Solicitor General.

SEPTEMBER, 1940.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 111 DETERMINATION OF AMOUNT OF GAIN OR LOSS.

(a) *Computation of gain or loss.*—Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in section 113, and the loss shall be the excess of such basis over the amount realized.

* * * * *

SEC. 113. BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * *

(5) PROPERTY TRANSMITTED AT DEATH.—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was ac-

quired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. * * *

* * * * *

(b) *Property acquired before March 1, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, shall be:

(1) the cost of such property (or, in the case of such property as is described in subsection (a) (1), (4), (5), or (12) of this section, the basis as therein provided), or

(2) the fair market value of such property as of March 1, 1913,

whichever is greater. In determining the fair market value of stock in a corporation as of March 1, 1913, due regard shall be given to the fair market value of the assets of the corporation as of that date.

SEC. 101. CAPITAL NET GAINS AND LOSSES.

(a) *Tax in case of capital net gain.*—In the case of any taxpayer, other than a corporation, who for any taxable year derives a capital net gain (as hereinafter defined in this section), there shall, at the election of the taxpayer, be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted and the total tax shall be this amount plus 12½ per centum of the capital net gain.

* * * * *

(c) *Definitions.*—For the purposes of this title—

(1) "Capital gain" means taxable gain from the sale or exchange of capital assets consummated after December 31, 1921.

* * * * *

(5) "Capital net gain" means the excess of the total amount of capital gain over the sum of (A) the capital deductions and capital losses, plus (B) the amount, if any, by which the ordinary deductions exceed the gross income computed without including capital gains.

* * * * *

(8) "Capital assets" means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. For the purposes of this definition—

(A) In determining the period for which the taxpayer has held property received on an exchange there shall be included the period for which he held the property exchanged, if under the provisions of section 113, the property received has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as the property exchanged.

(B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or ex-

change, the same basis in whole or in part in his hands as it would have in the hands of such other person.

(C) In determining the period for which the taxpayer has held stock or securities received upon a distribution where no gain is recognized to the distributee under the provisions of section 112 (g) of this title or under the provisions of section 203 (c) of the Revenue Act of 1924 or 1926, there shall be included the period for which he held the stock or securities in the distributing corporation prior to the receipt of the stock or securities upon such distribution.

* * * * *

The corresponding provisions of Section 113 (a) (5) and (13) of the Revenue Act of 1932 are substantially the same as those of Section 113 (a) and (b) above quoted.

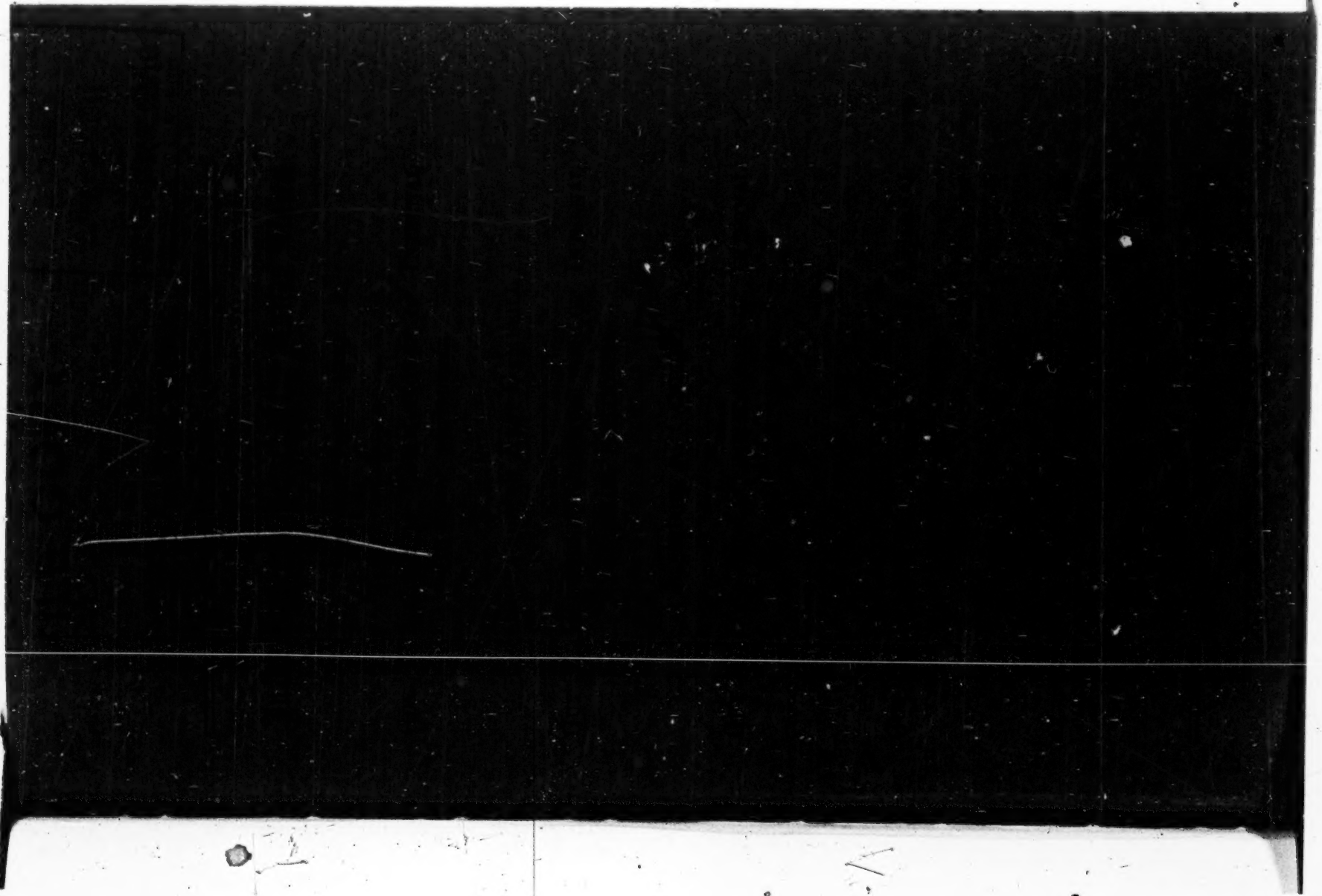
Treasury Regulations 77, promulgated under the Revenue Act of 1932:

ART. 58. *Sale of stock and rights.*—When shares of stock in a corporation are sold from lots purchased at different dates or at different prices and the identity of the lots can not be determined, the stock sold shall be charged against the earliest purchases of such stock. In the determination of the earliest purchases of stock the rules prescribed in subparagraphs (A), (B), (C), and (D) of section 101 (c) (8) (relating to the period for which property has been held) shall be applied. The excess of the amount realized on the sale over the cost or other basis of the stock will constitute gain. * * *

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INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statutes and regulations involved	4
Statement	5
Specification of errors to be urged	12
Summary of argument	14
Argument:	
I. Respondents' basis for securities delivered to them by testamentary trustees is the value of the securities when distributed by executors to trustees, if the securities were owned by the decedent at his death or were purchased by the executors, and cost to the trustees if the securities were purchased by them	19
II. The holding period for determining whether securities are capital assets within Section 101 of the Revenue Act of 1928 should be computed from the decedent's death for securities then owned by the decedent, and from the trustees' purchases for securities purchased by them	21
III. For the "first in, first out" rule, stock received by respondent from the decendent through a testamentary trust is "first in," as compared with stock purchased by respondent after the death of the decedent but before she received the inherited stock	26
IV. It is not material to the issues here involved whether or not respondents' interests vested at the decedent's death; if material, they did so vest	30
Conclusion	45
Appendix	46

CITATIONS

Cases:	
Archbold v. *Helvering*, decided December 2, 1940, reported in 1940 C. C. H., vol. 4, par. 9808	31
Beers v. *Commissioner*, 78 F. (2d) 447, certiorari denied, 296 U. S. 620	24, 30
Benton, Matter of, 244 App. Div. 56, affirmed, 269 N. Y. 579	42, 44
Brewster v. *Gage*, 280 U. S. 327	23, 24, 30, 34, 35
Burnet v. *Harmel*, 287 U. S. 103	34
Cammann v. *Bailey*, 210 N. Y. 19	42, 44

289259—41——1

Cases—Continued. Page

Campbell v. *Stokes*, 142 N. Y. 23 ..... 37, 40
Chandler v. *Field*, 63 F. (2d) 13, certiorari denied, 289 U. S. 758 ..... 24, 30, 38
Connelly v. *O'Brien*, 166 N. Y. 406 42
Dickerson v. *Sheehy*, 156 App. Div. 101, affirmed, 209 N. Y. 592 44
Doctor v. *Hughes*, 225 N. Y. 305 ..... 38, 40
Eveland's Will, Matter of, 284 N. Y. 64 44
Fidelity & Columbia T. Co. v. *Commissioner*, 90 F. (2d) 219, certiorari denied, 302 U. S. 723 39
Forbes v. *Commissioner*, 82 F. (2d) 204 31
Fulton Trust Co. v. *Phillips*, 218 N. Y. 573 ..... 42, 44
Goebel v. *Wolf*, 113 N. Y. 405 44
Haggerty, Matter of, 128 App. Div. 479, aff'd, 194 N. Y. 550 37
Helvering v. *Hallock*, 309 U. S. 106 ..... 18, 31
Helvering v. *Rankin*, 295 U. S. 123 27
Hopkins v. *Commissioner*, 69 F. (2d) 11 ..... 24, 30, 39
Huggett v. *Burnet*, 64 F. (2d) 705 ..... 24, 30
Kelly, Matter of, 167 Misc. 751 42
Lansing, Matter of, 182 N. Y. 238 ..... 37, 40
Leonard, Matter of, 143 Misc. (N. Y.) 172 ..... 37, 42
Lewisohn v. *Henry*, 179 N. Y. 352 ..... 40, 41, 44
Lyeth v. *Hoey*, 305 U. S. 188 34
McFeely v. *Commissioner*, 296 U. S. 102 ..... 15, 22, 23, 24, 25
Maguire v. *Helvering*, No. 346, present Term 5, 15, 19, 22, 23, 25, 28
Molter v. *Commissioner*, 69 F. (2d) 7 ..... 24, 30, 39
Moore v. *Littel*, 41 N. Y. 66 ..... 36, 39
Morgan v. *Commissioner*, 309 U. S. 78 34
Nelson v. *Russell*, 135 N. Y. 137 41
N. Y. Life Ins. & Trust Co. v. *Winthrop*, 237 N. Y. 93 43
Paterson v. *Ellis' Executors*, 11 Wend. (N. Y.) 259 44
Pringle v. *Commissioner*, 64 F. (2d) 863, certiorari denied, 290 U. S. 656 ..... 24, 31
Reynolds v. *Commissioner*, 114 F. (2d) 804, pending before this Court on petition for certiorari, No. 684, present Term 24, 31, 39
Roebling v. *Commissioner*, 78 F. (2d) 444 ..... 24, 30, 38
Seaman, Matter of, 147 N. Y. 69 ..... 37, 40, 41, 42
Snyder v. *Commissioner*, 295 U. S. 134 27
Steinway v. *Steinway*, 163 N. Y. 183 44
Steinwender, Matter of, 176 App. Div. 517, aff'd, 221 N. Y. 611 37
Tienken, Matter of, 131 N. Y. 391 ..... 42, 44
Vanderbilt, Matter of, 172 N. Y. 69 ..... 37, 38
Vanderpoel v. *Loew*, 112 N. Y. 167 44

Cases—Continued. Page

Van Vranken v. *Commissioner*, decided December 2, 1940, reported in 1940 C. C. H., vol. 4, par. 9807 ..... 24, 31, 35
Warner v. *Commissioner*, 72 F. (2d) 225, certiorari denied, 293 U. S. 620 ..... 24, 30, 38
Warner v. *Durant*, 76 N. Y. 133 44
Watson, Matter of, 262 N. Y. 284 ..... 37, 40, 45
Werner, Matter of, 167 Misc. 92 42
West v. *Burke*, 219 N. Y. 7 40

Statutes:

New York Real Property Law:
Sec. 40 36
Revenue Act of 1921, c. 136, 42 Stat. 227:
Sec. 202 30
Revenue Act of 1924, c. 234, 43 Stat. 253:
Sec. 204 30
Revenue Act of 1926, c. 27, 44 Stat. 9:
Sec. 204 ..... 30, 35
Revenue Act of 1928, c. 852, 45 Stat. 791:
Sec. 101 ..... 16, 17, 21, 25, 26, 29, 46
Sec. 113 ..... 3, 5, 19, 20, 24, 26
Revenue Act of 1932, c. 209, 47 Stat. 169:
Sec. 101 ..... 29, 49
Sec. 113 ..... 3, 5, 19, 20, 24, 50
Revenue Act of 1934, c. 277, 48 Stat. 680:
Sec. 113 (U. S. C., Title 26, Sec. 113) 30, 31, 35
Revenue Act of 1936, c. 690, 49 Stat. 1648:
Sec. 113 30
Revenue Act of 1938, c. 289, 52 Stat. 447:
Sec. 113 30

Miscellaneous:

H. Rep. No. 704, 73d Cong., 2d Sess., p. 28 (1939–1 Cum. Bull. (Part 2) 554, 575) 35
Huntington, The New York Test of Vested Remainders (1909), 9 Col. L. Rev. 687 38
O. D. 727, 3 Cum. Bull. 53 (1920) 34
S. Rep. No. 558, 73d Cong., 2d Sess., pp. 34–35 (1939–1 Cum. Bull. (Part 2) 586, 612–613) 35
Treasury Regulations 33 (1918 Revision), Par. 44 34
Treasury Regulations 45, Art. 1562 34
Treasury Regulations 62, Art. 1563 34
Treasury Regulations 65, Art. 1594 34
Treasury Regulations 69, Art. 1594 34
Treasury Regulations 74, Art. 501 53
Treasury Regulations 77:
Art. 58 ..... 27, 28, 29, 54
Art. 591 55
Art. 596 55
Art. 600 ..... 27, 28, 56
Art. 606 56

Miscellaneous—Continued.

	Page
Treasury Regulations 86:	
Art. 113 (a) (5)–1	35
Treasury Regulations 94:	
Art. 113 (a) (5)–1	35
Treasury Regulations 101:	
Art. 113 (a) (5)–1	35
Treasury Regulations 103:	
Sec. 19.113 (a) (5)–1	35

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 472

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

RICHARD VAN NEST GAMBRILL

No. 473

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

MARJORIE K. CAMPBELL

No. 474

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

SEYMOUR H. KNOX

No. 475

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

DOROTHY K. G. ROGERS

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The Board of Tax Appeals wrote a separate opinion in each of these cases. The opinion in No. 472 (R. 13) is reported at 38 B. T. A. 981; the opinion in No. 473 (R. 112) is reported at 39 B. T. A. 916; and the memorandum opinions in the other two cases (No. 474, R. 47; No. 475, R. 92) are unreported.

The court below rendered one opinion in all four cases, which is reported at 112 F. (2d) 530.

JURISDICTION

The judgments of the court below were entered on June 28, 1940, in case No. 472 (R. 35), and on June 29, 1940, in the other three cases (No. 473, R. 139; No. 474, R. 69; No. 475, R. 113). A petition for writs of certiorari as to all four cases was filed on September 28, 1940, and granted on November 12, 1940. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. During years governed by the Revenue Acts of 1928 and 1932 respondents sold securities which

they had received from testamentary trusts. Three types of securities are involved:

(a) Securities owned by the decedent at the time of death. (Presented in Nos. 472, 473, and 475.)

(b) Securities purchased by the testamentary trustees. (Presented in all four cases.)

(c) Securities purchased by the executors. (Presented in Nos. 473 and 475.)

The questions presented relate to the proper basis, under Section 113 (a) of the Revenue Acts of 1928 and 1932, for determining gain or loss upon these sales, namely:

(1) Whether the basis of the first group of securities is their value when received by the trustees from the decedent's estate, as we contend, or their value at the date of delivery by the trustees to the beneficiary;

(2) Whether the basis of the second group of securities is their cost to the trustees, as we contend, or their value at the date of delivery by the trustees to the beneficiary; and

(3) Whether the basis of the third group of securities is their value when received by the trustees from the decedent's estate, as we contend, or their value at the date of delivery by the trustees to the beneficiary.[1]

[1] Section 113 (b) of the Revenue Acts of 1928 and 1932 provides that the basis for determining gain or loss from the sale of property acquired before March 1, 1913, shall be the value specified in Section 113 (a), or the fair market

2. Whether, in the case of securities of the first two types enumerated in question 1, the holding period under Section 101 of the Revenue Act of 1928, relating to capital gains and losses, is to be measured from the date of the decedent's death for the first type and from the date of purchase for the second type, as we contend, or is to be measured for both types from the date of delivery by the trustees to the beneficiary. (Presented in Nos. 472 and 474.)

3. Whether in applying the "first in, first out" rule to a block of shares, part of which came to respondent from the decedent through the testamentary trust and part of which was purchased by respondent, respondent is to be deemed to have acquired the former part at the time of the decedent's death, as we contend, or at the time of delivery by the trustees to respondent (presented in No. 473).

STATUTES AND REGULATIONS INVOLVED

The Revenue Act of 1928 is applicable to some of the transactions involved in these cases, and the Revenue Act of 1932 is applicable to others.

The provisions of the 1928 Act and of the Treasury regulations promulgated thereunder which are pertinent to the question of basis for computing gain or loss are contained in the Appendix to the

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value of the property on March 1, 1913, whichever is greater. Since there is no dispute as to this proviso it is not taken into account in the Questions Presented and is ignored throughout this brief.

Government's brief in No. 346, *Maguire* v. *Helvering*. The provisions of the 1932 Act and of the Treasury regulations promulgated thereunder which are pertinent to that question are contained in the Appendix, *infra*, pp. 50–53, 55–57. These provisions do not differ in any respect here material from the provisions of the 1928 Act and the regulations thereunder. Section 113 (a) (5) of the two Acts is identical.

The provisions of the statutes and regulations pertinent to the questions of measuring the holding period and of determining the date of acquisition for purposes of the "first in, first out" rule are contained in the Appendix, *infra*, pp. 47–57.

STATEMENT

No. 472.—The facts have been stipulated (R. 24). As stated by the Board of Tax Appeals (R. 10), they may be summarized as follows:

On November 20, 1897, Mary Van Nest, grandmother of the respondent Richard Van Nest Gambrill died, leaving a will, the ninth article of which provided as follows (R. 10):

> NINTH: All the residue of my estate of every kind I give and devise as follows:
>
> One half thereof in equal shares to my daughters Mary Van Nest Jackson, Anna Van Nest Gambrill, and Jennie Van Nest Foster, and my granddaughter, Mary Alice Van Nest absolutely.

289259—41——2

> The other half thereof in four equal shares to my executors, to hold the same in trust, one share for the benefit of each of the same four persons to wit my said three daughters and my said granddaughter and to receive the income and pay the same to her during her life with full power to invest and reinvest in their discretion without any limitation whatsoever and at her death to transfer and deliver the same as she if leaving issue shall by will direct or in the absence of such direction, to her issue equally, or if she shall leave no issue, then to the survivors of said four persons to wit my said three daughters and my said granddaughter, and to the issue of any of the said four persons who may have died, the issue to take the share which the parent would have taken if living. * * *

On January 4, 1898, the executors delivered to themselves, as trustees for Anna Van Nest Gambrill, respondent's mother, certain securities (R. 10–11).

On March 23, 1928, Anna Van Nest Gambrill died without having exercised the power of appointment (R. 11). Respondent, born prior to the death of his grandmother, Mary Van Nest, was the sole surviving issue of his mother (R. 11).

On May 5, 1928, the trustees, after settling their accounts, delivered the balance of the corpus of the trust, consisting of securities, to respondent

as the remainderman (R. 12). Some of the securities were part of the original trust *res,* and others had been purchased by the trustees with trust funds, both prior to and subsequent to March 1, 1913 (R. 10–13).

During the calendar year 1930 respondent sold some of those securities, including both securities which were part of the original trust *res* and securities which had been purchased by the trustees (R. 12).

The Board of Tax Appeals sustained respondent's contentions that his basis for both classes of securities was their fair market value when delivered to him by the testamentary trustees and that his holding period for capital gain or loss purposes should be measured from the date when that delivery was made. It rejected the Commissioner's contentions that the correct basis was, for securities owned by the decedent at death, value at date of distribution by executors to themselves as trustees, and for securities purchased by the trustees, cost to the latter; and his contention that respondent's holding period should be measured from the decedent's death, for securities owned by him at that time, and from the dates of trustees' purchases, for securities purchased by them (R. 13–17).

The Circuit Court of Appeals affirmed the Board (R. 35).

Nos. 473, 474, and 475.—The facts, as stipulated (No. 473, R. 71; No. 474, R. 20; No. 475, R. 46), may be summarized as follows:[2]

Seymour H. Knox, the father of these three taxpayers, died May 16, 1915 (No. 473, R. 72). His will (No. 473, R. 87) provided that the residuary estate should be divided into four parts. One part, consisting of 20 percent of the whole, the testator did "give, devise, and bequeath" to three trustees in trust for the following uses and purposes (No. 473, R. 97):

> To receive, hold and, from time to time, invest and reinvest the same, and to collect the rents, income, issues, and profits on the property from time to time constituting such trust fund and to pay over so much of the net income arising therefrom, as to my said trustees shall seem wise and proper toward the support, maintenance, and education of my daughter, Marjorie Knox, until she shall arrive at the age of twenty-one (21) years, and to accumulate the balance of the income during her minority for her benefit, and to pay over the accumulated income to her when she shall arrive at the age of twenty-one (21) years and hereafter to pay over the entire net income to my said daughter, Marjorie Knox, until she shall arrive at the age of twenty-eight (28) years,

[2] In the following statement, where the facts are common to all three cases reference is made only to the Record in No. 473.

at which time, I give, devise, and bequeath to my said daughter, Marjorie Knox, one-half (½) of the property then constituting said trust fund and I direct my said trustees to pay over the net income on the remaining one-half (½) of said trust fund until she shall arrive at the age of thirty-five (35) years, at which time I give, devise, and bequeath the remaining part of said trust fund to my said daughter, Marjorie Knox, and to her heirs and assigns forever.

In the event that my said daughter, Marjorie Knox, shall die before reaching the age of thirty-five (35) years, I give, devise, and bequeath any part or portion of said trust fund, which has not then been paid over to her, or to the possession of which at the time of her death she was not entitled, unto the issue of said Marjorie Knox, if any, surviving her, to be divided among them, share and share alike. And in case there be no issue her surviving, then I give, devise, and bequeath said trust fund unto her heirs.

The Marjorie Knox referred to is the respondent Marjorie K. Campbell (No. 473, R. 72).

Another 20 percent was placed in trust for respondent Dorothy K. G. Rogers under exactly the same terms (No. 473, R. 95; No. 475, R. 75, 46).

A third 20 percent and certain specific securities in addition were placed in trust for respondent Seymour H. Knox under the same terms except that he was to receive $500,000 of the trust fund when he reached the age of twenty-five, one-half of

the remaining trust fund when he became thirty, and the balance at thirty-five. The income was payable to him in the meantime (No. 473, R. 96; No. 474, R. 32).

The trusts were formally established on July 1, 1921, and the executors on that date, pursuant to order of the Surrogate's Court, transferred to the trustees the property as provided in the will (No. 473, R. 72, 75, 103; No. 474, R. 39; No. 475, R. 47, 50, 55, 60, 63, 83).

Marjorie K. Campbell attained the age of twenty-eight on July 10, 1928, and received on that date one-half of the property then constituting her trust fund. Certain of the securities which she received at that time she sold during 1933, and certain of the bonds matured and were paid during 1933. Some of the securities sold by her had been held by her father at the time of his death, others had been purchased by the executors, and still others had been purchased by the trustees (No. 473, R. 114).

In 1926 and 1927 Marjorie Campbell purchased stock of F. W. Woolworth Company which, with stock dividends received in 1927, amounted to 1,000 shares. In 1928 she received delivery from the testamentary trust of 15,000 shares of F. W. Woolworth stock which represented shares owned by the testator at his death increased by subsequent stock dividends and a tax-free stock split up. In 1929 the Woolworth Company again split

its stock, giving two and one-half shares for one. Marjorie Campbell surrendered the 16,000 shares she owned (1,000 purchased, and 15,000 received from the trust) and received 40,000 shares. This was a tax-free transaction. In 1933 Marjorie Campbell sold 10,000 of the shares received in the 1929 split up. There is no way of identifying the shares sold with any particular shares surrendered in the 1929 split up (No. 473, R. 83–86).

Seymour H. Knox attained the age of thirty on September 1, 1928, and received on that date one-half of the trust fund then remaining in the hands of the trustees, including 8,575 shares of stock of Marine Share Corporation, of which 5,160 were purchased by the trustees on August 31, 1927, and 3,415 were purchased by the trustees on August 30, 1928. Mr. Knox gave up those shares thereafter in a non-taxable exchange and on June 10, 1930, sold the shares received on that exchange (No. 474, R. 49).

Dorothy K. G. Rogers became twenty-eight on August 26, 1924, and thirty-five on August 26, 1931, on each of which days she received distributions in accordance with the terms of the trust. During 1933 she sold securities so received. Some of the securities sold had been purchased by the trustees, some by the executors, and some of them had been owned by her father at the date of his death (No. 475, R. 93).

The Board of Tax Appeals sustained respondent's contentions that their basis was the fair

market value of the securities when delivered to them by the testamentary trustees; that the holding period for capital gain or loss purposes should be measured from the date of that delivery; and that acquisition for the purposes of the "first in, first out" rule took place on the same date. It rejected the Commissioner's determination that the correct basis was, as to securities owned by the decedent at death and as to securities purchased by the executors, the value of such securities when distributed by the executors to the trustees; and as to securities purchased by the trustees, their cost to the trustees. It also rejected the Commissioner's contentions that the holding period for capital gain or loss purposes should be measured from, and that acquisition for purposes of the "first in, first out" rule took place on, the date of the decedent's death for securities then owned by him, and the dates of purchase for securities purchased by executors or trustees (No. 473, R. 112–116; No. 474, R. 47–50; No. 475, R. 92–93).

The Circuit Court of Appeals affirmed the Board (R. 473, R. 133–139).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the words "time of the distribution to the taxpayer," as used in Section 113 (a) (5) of the Revenue Acts of 1928 and 1932,

mean the time of delivery by testamentary trustees to a beneficiary, and not the time of transfer from the executors to the trustees. (This assignment applies to Nos. 472, 473, and 475.)

2. In holding that the basis for determining gain or loss on the sales here involved was value at the dates of transfer from the trustees to the respective respondents. (This assignment applies to each of the instant cases.)

3. In holding that the dates of transfer from the trustees to the respondents should govern in determining the holding period for purposes of computing capital gain or loss under Section 101 of the Revenue Act of 1928. (This assignment applies to Nos. 472 and 474.)

4. In holding that the time of transfer from the trustees to the respondent should govern in determining when securities were acquired for purposes of applying the "first in, first out" rule. (This assignment applies to No. 473.)

5. In not holding, as to securities owned by the decedent at the time of his death and transferred from the executors to the respondents through the trustees, that the basis for determining gain or loss is value at the time of delivery by the executors to the trustees. (This assignment applies to Nos. 472, 473, and 475.)

6. In not holding, as to securities purchased by the trustees and transferred to the respondents, that the basis for determining gain or loss is cost

to the trustees. (This assignment applies to each of the instant cases.)

7. In not holding, as to securities purchased by the executors and transferred to respondents through the trustees, that the basis for determining gain or loss is value at the time of transfer from the executors to the trustees. (This assignment applies to Nos. 473 and 475.)

8. In not holding that for purposes of determining capital gains, the securities were held from and acquired at the date of the decedent's death, if owned by the decedent at death, and from dates of purchase, if purchased by trustees. (This assignment applies to Nos. 472 and 474.)

9. In not holding that for purposes of applying the "first in, first out" rule, the securities acquired by respondent from the decedent through the testamentary trust were acquired at the date of the decedent's death. (This assignment applies to No. 473.)

10. In affirming the decisions of the Board of Tax Appeals.

SUMMARY OF ARGUMENT

I. The respondents' basis for securities delivered to them by the testamentary trustees is their value when distributed by the executors to the trustees, in the case of securities owned by the decedent at his death or purchased by the executors, and cost to the trustees in the case of securities purchased by them. The Government's argu-

ment to this effect is contained in its brief in *Maguire* v. *Helvering;* No. 346, this Term, which is incorporated herein by reference.

II. The holding period for determining whether securities are capital assets within Section 101 of the Revenue Act of 1928 should be computed from the decedent's death for securities then owned by the decedent, and from the trustees' purchases for securities purchased by them. We have argued in our brief in the *Maguire* case that the value at the "time of * * * acquisition" which is the basis under the revenue acts other than those of 1928 and 1932 for property "acquired by bequest, devise, or inheritance", signifies the date of the decedent's death in the case of property which was owned by the decedent and the date of purchase by the trustees in the case of property purchased by them. And in *McFeely* v. *Commissioner,* 296 U. S. 102, this Court held that the date of "acquisition" for basis purposes under those acts and the date of commencement of the two-year holding period which defines a capital asset, are identical, regardless of the meaning of the phrase "time of distribution to the taxpayer" in Section 113 (a) (5) of the Revenue Acts of 1928 and 1932. If, however, we are right that the phrase just quoted refers to the time of distribution by the decedent's estate to the testamentary trust, and, further, that the beneficiary's basis for property purchased by the testamentary trustees is the cost to the trustees, then

the beneficiary is given the same basis as the trustee would have had if the trustee had made the sale. In that event there is supplied an additional reason that the beneficiary's holding period for capital gain or loss purposes begins to run at the date of death for property owned by the decedent at that time, and at the date of purchase for property purchased by the trustees; for Section 101 (c) (8) (B) of the Revenue Act of 1928 provides that a predecessor's holding period shall be added to the taxpayer's if the property has in the taxpayer's hands the same basis it would have had in the hands of the predecessor.

III. For the purposes of the "first in, first out" rule, stock received by a beneficiary from the decedent through a testamentary trust is "first in," as compared with stock purchased by the beneficiary after the death of the decedent but before the beneficiary received the inherited stock from the trustees. The so-called first in, first out rule is established by Treasury regulation for the purpose of artificially identifying shares sold with lots of the same stock which were purchased at different times, where actual identification is impossible. The regulations apply in terms only to purchased stock, but it is conceded by both sides that the rule should be applied here, despite the fact that part of the shares were acquired by will. The Commissioner has determined that for such shares the date of acquisition should be treated as equivalent

to the date of purchase, and that the date of the decedent's death is the date of acquisition. This solution is a reasonable disposition of an administrative difficulty, and it should be upheld. As an additional reason for upholding the Commissioner's determination, it may be observed that if our contentions as to basis under the 1928 and 1932 Acts are correct, then, in effect, the trustees' holding period must be added to that of the beneficiary under Section 101 (c) (8) (B) of the statute. In this event the applicable regulation expressly requires that the acquisition of shares for the purposes of the "first in, first out" rule be computed from the beginning of the trustees' holding period.

IV. It is not material to the issues here involved whether respondents' interests vested at the decedent's death, or, as they contend, only when each of them became entitled to the transfer of title from the testamentary trustees. If it is material, however, under the New York law respondents' interests vested at the decedent's death.

A number of Circuit Courts of Appeals have held, under the revenue acts prescribing value at the time of acquisition as the basis, that a vested remainderman acquires at the decedent's death property passing to him from the decedent through a testamentary trust. The Circuit Courts of Appeals are divided, however, as to whether a contingent remainderman acquires property delivered to him by a testamentary trustee at the de-

cedent's death or not until his remainder vests. The respondents in Nos. 473–475 contend that their respective interests vested only when each became entitled to the transfer of corpus from the testamentary trustees. Their argument continues that they cannot be deemed to have received distribution in advance of acquisition, and that acquisition for the purposes of the "first-in-first-out" rule and of marking the beginning of the capital asset holding period likewise cannot be deemed to antedate vesting.

We submit that no logical argument can be advanced for distinguishing between a vested and a contingent remainderman in determining the basis of each for property received from a testamentary trust. *Helvering* v. *Hallock,* 309 U. S. 106. The tax reasons are as strong in the one case as in the other for relating acquisition back beyond actual receipt of possession; in each case the taxpayer did not have control over the property while it was in the trustees' hands. Even a vested remainderman normally cannot know until the trust terminates that any specific property will be his, since the trustees may sell it. The Treasury regulations since 1934 specifically state that a remainderman, whether vested or contingent, acquires at the decedent's death property then owned by the decedent.

If, however, the issue is deemed material, under New York law the estates of the respondents in Nos. 473–475 were vested at the testator's death.

The New York decisions state that an interest is vested when a person in being can be pointed to who would take at the termination of any preceding estate, and that a condition which might take away the right of such person before the accrual of his right to possession is a divesting condition. This formula applied to the interests of the respondents in Nos. 473–475 marks them as vested.

ARGUMENT

I

RESPONDENTS' BASIS FOR SECURITIES DELIVERED TO THEM BY TESTAMENTARY TRUSTEES IS THE VALUE OF THE SECURITIES WHEN DISTRIBUTED BY EXECUTORS TO TRUSTEES, IF THE SECURITIES WERE OWNED BY THE DECEDENT AT HIS DEATH OR WERE PURCHASED BY THE EXECUTORS, AND COST TO THE TRUSTEES IF THE SECURITIES WERE PURCHASED BY THEM

In the brief for the Commissioner in *Maguire* v. *Helvering,* No. 346 this Term, it is argued that under Section 113 (a) (5) of the Revenue Acts of 1928 and 1932 the basis for securities delivered to a beneficiary by testamentary trustees is their value when distributed by the executors to the trustees, if the securities were owned by the decedent at his death, and cost to the trustees if the securities were purchased by them. That argument is respectfully incorporated herein by reference, and is not repeated here.

While the *Maguire* case does not involve the additional question presented here (in Nos. 473

and 475) of the basis for securities purchased by the executors, we think our argument in the *Maguire* case dispositive of that issue also. In Point II of that argument we concede, in view of language in the committee reports on the 1928 Act, that subsection (5) of Section 113 (a) of the Revenue Acts of 1928 and 1932 applies to purchases by executors. Accordingly the basis for such property is its value "at the time of the distribution to the taxpayer," and the controversy is whether, as we contend, the quoted phrase signifies the delivery of the property by the executors to the trustees, or, as respondents contend, the further delivery of the property by the trustees to them. This issue is, we think, precisely the same as that with respect to property received by executors from the decedent, which is covered in Point I of our brief in the *Maguire* case. If we are right in contending that the time of distribution for property which was owned by the decedent is the date on which it is turned over by the executors to the trustees, we think the same result follows as to property purchased by executors. On the other hand, if we are mistaken as to property owned by the decedent, and if the time of distribution for such property is the date on which it is delivered by the trustees to the beneficiaries, we concede that the same result follows as to property purchased by executors.

II

THE HOLDING PERIOD FOR DETERMINING WHETHER SECURITIES ARE CAPITAL ASSETS WITHIN SECTION 101 OF THE REVENUE ACT OF 1928 SHOULD BE COMPUTED FROM THE DECEDENT'S DEATH FOR SECURITIES THEN OWNED BY THE DECEDENT, AND FROM THE TRUSTEES' PURCHASES FOR SECURITIES PURCHASED BY THEM

In Nos. 472 and 474 some securities were sold within two years of their delivery by the trustees to respondents, but more than two years after they had come into the hands of the trustees, either through purchase or by distribution from the executors of the decedent's estate.[3] Section 101 of the applicable Revenue Act of 1928 (Appendix, p. 47) provides for lower rates of tax upon capital net gains and for smaller deductions for capital net losses, under certain circumstances, than would prevail for ordinary gains or losses. Capital gains or losses are defined as those resulting from sales or exchanges of capital assets. (Sec. 101 (c) (1) and (2).) Capital assets are defined as "property held by the taxpayer for more than two years" with certain exceptions and qualifications. (Sec. 101 (c) (8).) Thus, the securities referred to are capital assets (and the gain or loss realized upon their sale is capital net gain or loss)

[3] The securities delivered to the trustees by the executors had all been owned by the decedent; the question here dealt with is not presented as to securities purchased by executors.

only if respondents are deemed to have held them for a period prior to their actual delivery to respondents, and while they were in the possession of the trustees.

It so happens that if the Commissioner is right in his contention that respondents' basis for these securities is their value when delivered by executors to trustees, or in the case of securities purchased by the latter, their cost to the trustees (subject to the qualification stated note 1, *supra*, p. 3, about the March 1, 1913, value of securities acquired before that date), it would be to the Commissioner's advantage to assert that these securities were not capital assets in respondents' hands, since their selling price exceeded their basis thus computed. Nevertheless we think that *McFeely* v. *Commissioner*, 296 U. S. 102, and consistency with our argument in the *Maguire* case, require the conclusion that respondents' holding period dates from the decedent's death for property which he owned and from the date of purchase for property purchased by the trustees. In the *McFeely* case the Court held that the beneficiary's holding period under Section 101 of the Revenue Act of 1928 dated from the decedent's death for property which had been owned by the decedent and which was distributed to the beneficiary by the executors, notwithstanding that the beneficiary's basis under Section 113 (a) (5) of the 1928 Act was value at the

time of distribution to him by the executors. And the Court further held that the commencement of the holding period was the same as the "time of * * * acquisition" which the revenue acts prior to 1928 [and since 1934] prescribed as the basis for property "acquired by bequest, devise, or inheritance." In *Brewster* v. *Gage*, 280 U. S. 327, the Court had decided that the "time of * * * acquisition" for basis purposes was the date of the decedent's death in the case of property which he had owned and which was distributed to the beneficiary by the executors. And in our brief in the *Maguire* case we argue (though the question is not directly involved), that value at the "time of * * * acquisition" under the revenue acts other than those of 1928 and 1932 signifies the date of the decedent's death in the case of property which was owned by the decedent, and the date of purchase by the trustees in the case of property purchased by them. Hence, as stated, we take the position here that respondents' holding period dates from the decedent's death for property which the decedent owned and from the date of purchase for property purchased by the trustees. Under the *McFeely* case this result follows even if respondents are right and we are wrong about the basis question under the 1928 and 1932 Acts—that is, even if the basis for both classes of property is value when delivered to the beneficiary by the testamentary trustees.

Respondents have urged, apparently thinking it necessary to their position on the basis question, and the Board and the court below have adopted the view, that the instant cases are distinguishable from the *McFeely* case because here a testamentary trust intervened between death and delivery to the taxpayer. But in other cases involving basis under the revenue acts other than those of 1928 and 1932 the Circuit Courts of Appeals (including the court below) have applied the rule of *Brewster* v. *Gage* though testamentary trusts intervened,[4] and have held that the decedent's death was the "time of * * * acquisition." And under the *McFeely* case that question is precisely the same as that there involved, *i. e.*, as to when the holding period under Section 101 commenced.

A qualification made by some cases[5] but recently repudiated by the court below in *Van Vranken* v. *Commissioner*, decided December 2,

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[4] *Chandler* v. *Field*, 63 F. (2d) 13 (C. C. A. 1st), certiorari denied, 289 U. S. 758; *Warner* v. *Commissioner*, 72 F. (2d) 225 (C. C. A. 2d), certiorari denied, 293 U. S. 620; *Van Vranken* v. *Commissioner*, *supra*; *Roebling* v. *Commissioner*, 78 F. (2d) 444 (C. C. A. 3rd); *Beers* v. *Commissioner*, 78 F. (2d) 447 (C. C. A. 3rd), certiorari denied, 296 U. S. 620; *Molter* v. *Commissioner*, 69 F. (2d) 7 (C. C. A. 7th); *Hopkins* v. *Commissioner*, 69 F. (2d) 11 (C. C. A. 7th); *Huggett* v. *Burnet*, 64 F. (2d) 705 (App. D. C.).

[5] *Pringle* v. *Commissioner*, 64 F. (2d) 863 (C. C. A. 9th), certiorari denied, 290 U. S. 656; *Reynolds* v. *Commissioner*, 114 F. (2d) 804 (C. C. A. 4th), now pending before this Court on petition for certiorari, No. 684, present Term.

1940, reported in 1940 C. C. H., vol. 4, par. 9807, is that in the case of a beneficiary who has only a contingent (instead of a vested) interest prior to the termination of the trust, the "time of * * * acquisition" is the termination of the trust, because such a beneficiary does not "acquire" the property until the remainder vests at the time of that termination. We argue, *infra*, pp. 30–45, that the respondents in these cases took vested remainders at the deaths of the respective decedents, but that even if they did not, the distinction for basis purposes made by some courts between vested and contingent remaindermen is untenable and should not prevail. Under the *McFeely* case that argument applies equally on the holding period question, and we therefore think that whether or not respondents' interests were vested, their holding periods began at the dates of death or of purchase by the trustees.

The foregoing is without reference to our contentions in the *Maguire* brief as to basis under the 1928 (and 1932) Acts. If, however, we are correct on that issue, additional support is afforded to the proposition that the holding period under Section 101 of the Revenue Act of 1928 should be computed from the decedent's death for securities then owned by the decedent and from the trustees' purchases for securities purchased by them. Section 101 (c) (8) (B) of the Revenue Act of 1928 provides that in determining the taxpayer's holding period there shall be included the period for

which the property was held by any other person, if under Section 113 the property has the same basis in the taxpayer's hands as it would have in the hands of the other person. If we are correct in our contentions that the beneficiary's basis for securities owned by the decedent at his death is their value when distributed by the executors to the trustees, and that the basis for securities purchased by the trustees is their value when purchased, then the property has the same basis in the hands of the beneficiary that it would have had in the hands of the trustees, and Section 101 (c) (8) (B) is called into operation.

III

FOR THE "FIRST IN, FIRST OUT" RULE, STOCK RECEIVED BY RESPONDENT FROM THE DECEDENT THROUGH A TESTAMENTARY TRUST IS "FIRST IN", AS COMPARED WITH STOCK PURCHASED BY RESPONDENT AFTER THE DEATH OF THE DECEDENT BUT BEFORE SHE RECEIVED THE INHERITED STOCK

Respondent in No. 473, Marjorie K. Campbell, was the owner in 1933 of 40,000 shares of F. W. Woolworth Company stock, of which she sold 10,000 shares in that year. She had obtained the 40,000 shares in 1929 in an exchange, pursuant to a recapitalization of the Woolworth Company, of two and one-half shares of new stock for each share of old stock (R. 85). Respondent's old stock which went into the exchange consisted of 1,000 shares, representing purchases with her own funds subsequent

to her father's death but prior to 1928, and 15,000 shares which had been owned by her father at his death and which were delivered to her by testamentary trustees in 1928 (R. 83–84). The 10,000 shares sold by respondent in 1933 cannot be identified as being derived either from her own purchases or from the shares received from the trustees, since the identity of the shares was lost in the exchange (R. 85).

The court below agreed that the so-called "first in, first out" rule should be applied to determine the cost of the stock sold, but held that the Commissioner erred in allocating the stock sold entirely to the old shares acquired from respondent's father; the court ruled that he should have allocated the shares sold first to the shares purchased by respondent. In other words, the court (and the Board of Tax Appeals) held that the purchased shares should be regarded as "first in."

The so-called "first in, first out" rule, established by Treasury regulation, has for its purpose the artificial identification of shares sold out of lots of the same issue of stock purchased at different times and for different prices, where the actual identification of shares sold with particular shares purchased is impossible. Cf. *Helvering* v. *Rankin*, 295 U. S. 123; *Snyder* v. *Commissioner*, 295 U. S. 134. The pertinent regulations are Articles 58 and 600 (4) of Treasury Regulations 77 (Appendix, pp. 55, 56), promulgated under the Revenue Act of 1932. The general rule is stated in

Article 58 that where the stock sold cannot be identified with any particular lots purchased, it shall be charged against the earliest purchases. Article 600 (4) applies the same rule to stock obtained in a reorganization in respect of several lots purchased at different times or prices.

These regulations refer specifically to purchases only and so do not in terms apply to the shares acquired under the will of the taxpayer's father, but since the problem here is in substance the same as that with which the regulations deal the parties agreed before the Board of Tax Appeals that the "first in, first out" rule should be applied (No. 473, R. 115).

We have contended in the *Maguire* brief that for basis purposes under the revenue acts other than of 1928 and 1932 a beneficiary of a testamentary trust acquires the property at the decedent's death. And we have contended under Point II herein, that the capital asset holding period commences at the date of the beneficiary's "acquisition," which is the same as the time of acquisition for basis purposes, i. e., the date of the decedent's death. From his determination in this case it appears that the Commissioner's rule is to use this same date of acquisition for "first in, first out" purposes. We submit that such a rule is entirely permissible. The rule is necessarily artificial, but some method of determination must be adopted for administrative purposes. Unless it

reaches a result which is of necessity wrong, and in such sense arbitrary, the administrative rule should not be overturned. There can be no real substance to an argument that the rule must necessarily depend on physical possession or the acquisition of title.

The foregoing argument is made without reference to our contention as to basis under the Revenue Acts of 1928 and 1932. But if we are right in that argument, there is still another theory upon which it may be held that the father's shares are to be considered first in. Article 58 of Treasury Regulations 77 states:

> In the determination of the earliest purchases of stock the rules prescribed in subparagraphs (A), (B), (C), and (D) of section 101 (c) (8) (relating to the period for which property has been held) shall be applied. * * *

As we have stated in Point II, *supra*, p. 25–26, under the literal language of Section 101 (c) (8) (B) of the Revenue Acts of 1928 and 1932, a testamentary trustee's holding period is to be included in that of the beneficiary, if our theory as to basis is sound, since upon our theory the basis for each is the same. If such is the case it would follow, therefore, that under Article 58 the beneficiary's stock is purchased or acquired at the date of the decedent's death, since the trustee's holding period begins at that time.

IV

IT IS NOT MATERIAL TO THE ISSUES HERE INVOLVED WHETHER OR NOT RESPONDENTS' INTERESTS VESTED AT THE DECEDENT'S DEATH; IF MATERIAL, THEY DID SO VEST

In interpreting the provision, found in all of the Revenue Acts since 1921 except the Acts of 1928 and 1932, that the basis for property acquired by gift, devise, or inheritance is its fair market value at the time of its acquisition, a number of Circuit Courts of Appeals have held that a vested remainderman acquires at the decedent's death property passing to him from the decedent through a testamentary trust. *Chandler* v. *Field,* 63 F. (2d) 13 (C. C. A. 1st), certiorari denied, 289 U. S. 758; *Warner* v. *Commissioner,* 72 F. (2d) 225 (C. C. A. 2d), certiorari denied, 293 U. S. 620; *Roebling* v. *Commissioner,* 78 F. (2d) 444 (C. C. A. 3rd); *Beers* v. *Commissioner,* 78 F. (2d) 447 (C. C. A. 3rd), certiorari denied, 296 U. S. 620; *Molter* v. *Commissioner,* 69 F. (2d) 7 (C. C. A. 7th); *Hopkins* v. *Commissioner,* 69 F. (2d) 11 (C. C. A. 7th); *Huggett* v. *Burnet,* 64 F. (2d) 705 (App. D. C.). These decisions are a logical extension of *Brewster* v. *Gage,* 280 U. S. 327, which related back to the date of the decedent's death the acquisition by a residuary legatee of property originally owned by the decedent and distributed to the legatee by the executors.

It has been held by some lower courts, however, that a contingent remainderman does not

acquire property delivered to him by a testamentary trustee until his remainder vests. *Pringle* v. *Commissioner,* 64 F. (2d) 863 (C. C. A. 9th), certiorari denied, 290 U. S. 656; *Reynolds* v. *Commissioner,* 114 F. (2d) 804 (C. C. A. 4th), now pending in this Court on petition for writ of certiorari, No. 684, present Term. An analogous rule has been held to apply to a contingent remainderman who acquires property by transfer in trust *inter vivos.* *Forbes* v. *Commissioner,* 82 F. (2d) 204 (C. C. A. 1st). On the other hand, the Circuit Court of Appeals for the Second Circuit, relying upon this Court's decision in *Helvering* v. *Hallock,* 309 U. S. 106, recently held that for purposes of Section 113 (a) (5) of the 1934 Act no distinction should be recognized between vested and contingent remainders, and that a remainderman acquired property at the decedent's death within the meaning of that section whether or not he had a vested remainder at that time. *Van Vranken* v. *Commissioner,* decided December 2, 1940, reported in 1940 C. C. H., vol. 4, par. 9807. See also *Archbold* v. *Helvering,* decided December 2, 1940, reported in 1940 C. C. H., vol. 4, par. 9808.

The respondent in No. 472 has not disputed our assertion that his estate vested at the testator's death, but the respondents in Nos. 473–475, inclusive, relying upon the distinction made by the above cases, have argued that their respective estates did not vest until each of them became

entitled to the transfer of corpus from the testamentary trustees. While we are concerned in these cases with the 1928 and 1932 Acts, which speak of the "time of the distribution to the taxpayer", rather than of the time of acquisition, respondents point out that it would be illogical to think of distribution to a taxpayer as preceding his acquisition. And they argue that "acquisition", and hence time of distribution, should not refer to the time of distribution to a trustee for a contingent remainderman, even though that remainderman does finally come into possession of and sell the property in question. Respondents in Nos. 473–475 have also contended that for the purposes of the "first in, first out" rule and of marking the beginning of the holding period which determines whether property is a capital asset, each of them acquired the property when, and not before, their respective estates vested, which, they say, was when they became entitled to the transfer of corpus from the testamentary trustees.

1. We submit, in the first place, that no distinction should be drawn between a contingent remainder and a vested remainder subject to divestment upon an identical contingency, in determining the basis of property received from a testamentary trust. Each remainderman has become the taxpayer only because the property in question has been delivered to and sold by him. In each case

the tax reasons are equally strong for relating back the acquisition date to the date of the decedent's death and the distribution date to the date of the distribution of the decedent's estate; for in each case it is equally undesirable to deny tax effect to changes in value occurring while the property is held by testamentary trustees prior to its tax-free transfer to the taxpayer. Nor has a contingent remainderman any greater cause for complaint than a vested remainderman. Neither has possession or control of the property in question while it is held by the fiduciary. Even a vested remainderman normally cannot be sure that he will get any particular property in the trust estate, since the trustee usually has the power to invest and reinvest, or to convert into cash before distributing, as the trustees had in the instant cases. The distinction on which respondents rely is not between conditional and absolute estates, but between technically vested and technically contingent estates.

Indeed, if we correctly understand respondents' contention, they concede that under New York law, which they assert is controlling, each of them would have taken a vested estate at the testator's death if he had employed slightly different wording in the limitations. They admit that if there had been a gift to each child subject to a trust until he reached a given age, his estate would have been vested; but they assert that since the gift was to trustees to pay the income to the child until

he reached that age and then to pay the principal to him, it was contingent. We do not understand respondents to contend that the gift over in the event of the child's death under the given age affects the controversy. Thus no substantive rights of any beneficiary are involved. The decisions of this Court have clearly established the rule that the application of a Federal tax statute should not depend upon such variations and complexities of local law, especially where the distinctions which would result involve form or definition rather than substance. *Lyeth* v. *Hoey,* 305 U. S. 188, 193–194; *Morgan* v. *Commissioner,* 309 U. S. 78, 80–81; *Burnet* v. *Harmel,* 287 U. S. 103.

The Treasury regulations applicable to the 1926 and earlier Acts have consistently stated that in the case of property acquired by bequest, devise, or inheritance, the value of the property as appraised for estate or inheritance tax purposes shall be taken to be the value thereof at the time of acquisition.[6] *Brewster* v. *Gage,* 280 U. S. 327, gave these regulations the obvious interpretation that property acquired by bequest, devise, or inheritance is acquired at the decedent's death. We submit that O. D. 727, 3 Cum. Bull. 53 (1920), ruling that a contingent remainderman receiving property from

[6] Treasury Regulations 33 (1918 Revision), Par. 44 (1916 Act); Treasury Regulations 45, Art. 1562 (1918 Act); Treasury Regulations 62, Art. 1563 (1921 Act); Treasury Regulations 65 (1924 Act) and 69 (1926 Act), Art. 1594.

the decedent through a testamentary trust does not acquire until the vesting of his estate, is out of harmony with the regulations.[7] Beginning in 1934 the regulations have expressly provided that property acquired by bequest, devise, or inheritance is acquired at the decedent's death, whether the taxpayer's interest was then vested or contingent.[8] The 1934 regulations were upheld by the Second Circuit in the *Van Vranken* case, *supra*, and we submit that they do not change the import of the regulations in 1926 and theretofore.

2. The will of Seymour H. Knox, the testator in Nos. 473–475, devised property in trust for each of his children, the income to be paid to the child until he reached a given age, "at which time, I give, devise, and bequeath" the principal to him; but if he should die before reaching the specified

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[7] This view is strengthened by the remarks of the Senate and House Committees with respect to Section 113 (a) (5) of the Revenue Act of 1934, which reverted to the form of Section 204 (a) (5) of the Revenue Act of 1926. The Committees stated that the Supreme Court in *Brewster* v. *Gage* had defined "the date of acquisition" to mean "the date of death in the case of all property passing by bequest, devise, and inheritance, whether real or personal. * * *" Report of Senate Finance Committee, S. Rep. No. 558, 73d Cong., 2d Sess., pp. 34–35 (1939–1 Cum. Bull. (Part 2) 586, 612–613); Report of House Ways and Means Committee, H. Rep. No. 704, 73d Cong., 2d Sess., p. 28 (1939–1 Cum. Bull. (Part 2) 554, 575).

[8] Treasury Regulations 86, 94, and 101, Art. 113 (a) (5)–1 (promulgated under the Revenue Acts of 1934, 1936, and 1938, respectively); Treasury Regulations 103, Sec. 19.113 (a) (5)–1 (promulgated under the Internal Revenue Code).

age, the principal was to go to his surviving issue, and, if none, to his heirs at law. Although we believe it to be immaterial, under the New York law this probably gives to each of the respondents in Nos. 473–475 a technically vested estate at the testator's death.

The inquiry into the New York law is beclouded at the outset, however, and the undesirability of having federal tax issues turn on the distinction between vested and contingent remainders is illustrated by the fact that, so far as we can learn, the distinction is without practical effect in New York. While the New York Real Property Law defines vested and contingent remainders,[9] and while the New York courts have frequently discussed whether a particular estate was vested or contingent, in none of these cases, so far as we can perceive, was the court's conclusion attended by any particular consequence. For example, *Moore* v. *Littel*, 41 N. Y. 66, contains a frequently cited discussion of the distinction between vested and contingent remainders. There the question was the alienability of the remainder. After a painstaking analysis that an estate to A for life, then to his

[9] "§ 40. *When future estates are vested; when contingent.* A future estate is either vested or contingent. It is vested, when there is a person in being, who would have an immediate right to the possession of the property, on the determination of all the intermediate or precedent estates. It is contingent while the person to whom or the event on which it is limited to take effect remains uncertain."

heirs (the rule in *Shelly's* case being inoperative in New York) gave the heirs living at the testator's death vested remainders, subject to divesting if they predeceased A, the court concluded that this characterization was immaterial, for it held that the interest was alienable even if contingent. Similarly, analysis of the various other New York cases discussing the question shows that in each instance the issue was academic.[10] The conclusion

[10] In *Campbell* v. *Stokes*, 142 N. Y. 23, 29–30, the limitation was to A for life, then to his surviving issue, and the question was whether children of A were necessary parties to a partition action brought after the testator's death but before A's. After carefully reasoning that the children had vested remainders which would be divested if they predeceased A, the court concluded that, contingent or vested, their interests entitled them to participation in the proceeding.

Matter of Vanderbilt, 172 N. Y. 69, 72; *Matter of Steinwender*, 176 App. Div. 517, affirmed 221 N. Y. 611; *Matter of Haggerty*, 128 App. Div. 479, affirmed, 194 N. Y. 550; *Matter of Seaman*, 147 N. Y. 69; and *Matter of Lansing*, 182 N. Y. 238, are state inheritance tax cases. The first two dealt with a law taxing a testamentary transfer subject to future contingencies at the highest rate to which any of the contingencies might lead. As is logical, these cases reveal that the character of the future interests, as contingent or vested subject to possible divesting, was really immaterial to the construction of the law. The last three cases exempt from tax property passing by will before the enactment of the inheritance tax law, and as is made plain at page 248 of the opinion in *Matter of Lansing*, *supra*, this result would follow even if the estates in remainder were contingent until after the law had been enacted.

Matter of Watson, 262 N. Y. 284, 299, and *Matter of Leonard*, 143 Misc. 172, each involved a gift which was, substantially, to the testator's children in shares, and on the

that the distinction between remainders which are vested subject to divesting and those which are technically contingent is not of significance in New York is likewise reached in Huntington, The New York Test of Vested Remainders, (1909) 9 Columbia Law Review 687, 69[illegible].

Turning, however, to the question of what label the New York law would attach to respondents' remainders in this case, we think it fairly clear that it would describe them as vested rather than contingent; that is, as subject to a condition subsequent rather than a condition precedent.[11] In *Matter of Vanderbilt,* 172 N. Y. 69, 72, it was said:

> By the seventeenth clause of the will of the testator the residue and remainder of

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death of any child, his share to his surviving issue, or if none, the testator's other children. The question was whether the final limitation was to children living at the death of the testator or of the child. In reaching the former result the children's remainders in each share were analyzed as vested, but to be divested upon the survival of issue of the child in question. The same result could have been reached by saying that the children had contingent remainders in each share, to vest on the death of the child in question without issue.

In *Doctor* v. *Hughes*, 225 N. Y. 305, 310, reference to estates vested subject to divesting was pure dictum.

[11] A number of the Circuit Court of Appeals cases, discussed, *supra*, pp. 30–31, have involved limitations very similar to those in the present case. All but one held that the beneficiary took a vested estate, despite the existence of the divesting condition, and that the beneficiary's acquisition occurred at the testator's death. *Warner* v. *Commissioner*, *supra; Chandler* v. *Field*, *supra; Roebling* v. *Commissioner*,

> his estate was given in trust to his executors for the benefit of his son Alfred G. Vanderbilt, which trust is to continue until he becomes thirty years of age, at which time one-half of the trust estate is to be turned over to him, and, as to the balance, the trust is to continue until he becomes thirty-five, when the remainder is to become his absolutely. The will also contains a provision that in case he dies before becoming thirty or thirty-five the estate shall be given to other persons. The only contingency, therefore, that can happen to defeat his taking the estate in possession is his death before the period fixed for the transfer of the possession of the property to him. The estate created, therefore, is an estate in trust for the periods mentioned, with a remainder vested in Alfred G., subject to be defeated by his death before arriving at the age of thirty or thirty-five. [Citing cases.]

This doctrine that an estate is vested when a person in being can be pointed to who would take at the termination of any preceding estate, and that a condition which might take away the right of such person before the accrual of his right to possession is a divesting condition, is repeated in a number of New York decisions. *Moore* v. *Littel,*

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supra; Fidelity & Columbia T. Co. v. *Commissioner*, 90 F. (2d) 219 (C. C. A. 6th), certiorari denied, 302 U. S. 723; *Molter* v. *Commissioner*, *supra; Hopkins* v. *Commissioner*, *supra*. *Reynolds* v. *Commissioner*, *supra*, reached a contrary result erroneously, we believe, under North Carolina law.

41 N. Y. 66; *Campbell* v. *Stokes,* 142 N. Y. 23, 29–30; *Matter of Watson,* 262 N. Y. 284, 299; *Matter of Seaman,* 147 N. Y. 69; *Matter of Lansing,* 182 N. Y. 238; *Doctor* v. *Hughes,* 225 N. Y. 305, 310; *West* v. *Burke,* 219 N. Y. 7, 15–16.

Before the court below, respondents laid much stress upon the so-called "divide and pay over" rule as supporting their contention that they took only a contingent estate at the testator's death. The case particularly relied upon was *Lewisohn* v. *Henry,* 179 N. Y. 352, where the gift was of a share to be held in trust, income to A until A should reach twenty-five years, at which time the trustees were "to convey, transfer, deliver, and pay over" to A one-fourth of the principal. One-third of the "capital * * * then remaining" was to be paid over to A when he reached thirty. The "residue" was to be held in trust for A for life. On A's death "the capital * * * as it shall then exist" was to be turned over to A's appointees by will, or if none, to others specified. The court, relying upon the fact that there was no gift to A except through a direction to the trustees to convey (i. e., relying upon the "divide and pay over" rule), and also upon the fact that the gift over on A's death was of the capital "as it shall then exist," not of the residue (after paying half to A), held that upon A's death under twenty-five the gift over was effective as to the entire capital, and that A's heirs did not take the one-half which would have come to A had he lived to thirty. His

arrival at the specified ages was held to be a condition of his taking.

The *Lewisohn case,* and the "divide and pay over rule" in general, are of no aid to the respondents here for two reasons. First, the rule comes into play only in case of a direction to trustees or executors to convey or pay over at a future time. The cases in which the rule has been applied involve wills with no words of gift to the designee in question other than such a direction to convey or pay over. In *Matter of Seaman, supra,* the limitation was to trustees for A for life "and upon her decease I give, devise and bequeath" to the children of B. The court observed (p. 74):

> The respondent, nevertheless, relies upon the rule applying to bequests of personalty that, where time is of the essence of the gift, and there is no present gift, nothing passes until the prescribed period arrives. (*Warner* v. *Durant,* 76 N. Y. 133; *Smith* v. *Edwards,* 88 id. 92.) A reference to those cases and others which have followed them shows that the rule formulated was for the construction of bequests where there was no gift at all, except that involved in the direction to divide at a future time. Here there are words of present gift, for the phrase "upon her decease," like the expression "from and after," does not prevent the legacy from vesting. (*Nelson* v. *Russell,* 135 N. Y. 137.) Explicitly the will

says, "I give, devise and bequeath" the estates in remainder, and we are not compelled to resort to a direction to divide for an inference of an intention to give at all. I think the rule referred to has no application to a case like the present, where there are explicit words of gift beyond a direction to divide.

Upon that view of the will, it is obvious that a right of succession to the estates in remainder passed at once on the death of the testator to the four children and was a vested interest, although subject to be defeated or modified by subsequent contingencies. * * *

See also *Matter of Leonard, supra,* page 178. In the *Knox* will, the words used are "give, devise, and bequeath." The preceding words "at which time" like the words "upon her [the life tenant's] death" in the *Seaman* case do not prevent vesting of the estate at the testator's death. *Nelson* v. *Russell,* 135 N. Y. 137; *Connelly* v. *O'Brien,* 166 N. Y. 406, 408; *Matter of Werner,* 167 Misc. 92; *Matter of Kelly,* 167 Misc. 751.

Second, the "divide and pay over" rule is but a rule of construction intended to aid in ascertaining the testator's intent where it is not otherwise made clear. *Matter of Tienken,* 131 N. Y. 391, 409; *Cammann* v. *Bailey,* 210 N. Y. 19, 30; *Fulton Trust Co.* v. *Phillips,* 218 N. Y. 573, 582–583; *Matter of Benton,* 244 App. Div. 56, 61, affirmed, 269 N. Y. 579. As such, it is a rule to determine who shall

take upon the happening of a given contingency, the testator not having clearly specified. It is usually used to ascertain whether the gift is subject to any condition at all, and is not concerned with the problem whether, if the condition exists, it is a condition precedent or a condition subsequent. As Mr. Justice Cardozo observed in *N. Y. Life Ins. & Trust Co.* v. *Winthrop,* 237 N. Y. 93, at pages 103–104:

> When we speak in this connection of the vesting of an interest, we mean, of course, a vesting that is absolute and final. The statutory definition of vested and contingent estates sheds little light upon the problem, for an estate may be vested within the definition of the statute, though defeasible by death before the moment of division (*Moore* v. *Littel,* 41 N. Y. 66; *Campbell* v. *Stokes,* 142 N. Y. 23, 30; *Clowe* v. *Seavey,* 208 N. Y. 496, 502; *Doctor* v. *Hughes,* 225 N. Y. 305, 310). The only significant distinction for the purpose now in view is between an estate that is absolute and one subject to conditions (*Matter of Curtis,* 142 N. Y. 219, 223; *Matter of Seaman,* 147 N. Y. 69, 75).
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> Survivorship being a condition, we hold that it is survivorship at the time of distribution [citing cases]. We are not blind to the fact that other readings of the will are possible and plausible. In such a situation, the canon of construction which distinguishes between a direct gift and one through the medium of a mandate to de-

liver and convey may fairly turn the scale. * * *

It is worthy of note, moreover, that even in its own field *Lewisohn* v. *Henry, supra,* is of doubtful authority. Many New York decisions preceding and following it seem to be to the contrary. *Paterson* v. *Ellis' Executors,* 11 Wend. (N. Y.) 259; *Warner* v. *Durant,* 76 N. Y. 133; *Vanderpoel* v. *Loew,* 112 N. Y. 167; *Goebel* v. *Wolf,* 113 N. Y. 405, 415; *Steinway* v. *Steinway,* 163 N. Y. 183; *Cammann* v. *Bailey,* 210 N. Y. 19; *Fulton Trust Co.* v. *Phillips,* 218 N. Y. 573; *Matter of Benton,* 244 App. Div. 56, affirmed, 269 N. Y. 579; *Matter of Eveland's Will,* 284 N. Y. 64. Compare *Matter of Tienken,* 131 N. Y. 391; *Dickerson* v. *Sheehy,* 156 App. Div. 101, affirmed, 209 N. Y. 592. Most of these cases, particularly *Cammann* v. *Bailey, Fulton Trust Co.* v. *Phillips,* and *Matter of Benton* involve limitations indistinguishable in substance from those in *Lewisohn* v. *Henry.* The cited cases hold that the payment of income to a beneficiary during the period that the principal is withheld from him, the setting apart of a separate trust share for him, and the adding of specific property to his share,[12] all are factors which indicate an intention of present vesting rather than future

[12] Specific bank stocks were included in the trust share of respondent Seymour H. Knox, Jr. (No. 474, R. 31–32), indicating a vested estate in him. The basic limitations to the other children being substantially identical to the limitation to Seymour H. Knox, Jr., it may be assumed that they too had vested estates.

gift, and override the futurity inherent in a direction to divide and pay. All of those factors are present in the instant case, and the direction to divide and pay is absent, having been replaced here by words of direct gift.

Finally, in *Matter of Watson,* 262 N. Y. 284, the court observed (p. 300):

> The law favors the vesting of estates, and, unless a contrary intention is unequivocally expressed, it will not be imputed. * * *

Accordingly we submit that while a reading of the New York decisions will show that no substantive rights turn in that state upon the distinction between a contingent estate and an estate which is vested subject to being divested, nevertheless, it is fairly clear that the New York courts would define the estate of each of the respondents here as of the latter type.

CONCLUSION

For the reasons stated the decision of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

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JANUARY 1941.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 101. CAPITAL NET GAINS AND LOSSES.

(a) *Tax in case of capital net gain.*—In the case of any taxpayer, other than a corporation, who for any taxable year derives a capital net gain (as hereinafter defined in this section), there shall, at the election of the taxpayer, be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted and the total tax shall be this amount plus 12½ per centum of the capital net gain.

(b) *Tax in case of capital net loss.*—In the case of any taxpayer, other than a corporation, who for any taxable year sustains a capital net loss (as hereinafter defined in this section), there shall be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted, and the total tax shall be this amount minus 12½ per centum of the capital net loss; but in no case shall the tax of a taxpayer who has sustained a capital net loss be less than the tax computed without regard to the provisions of this section.

(c) *Definitions.*—For the purposes of this title—

(1) "Capital gain" means taxable gain from the sale or exchange of capital assets consummated after December 31, 1921.

(2) "Capital loss" means deductible loss resulting from the sale or exchange of capital assets.

(3) "Capital deductions" means such deductions as are allowed by section 23 for the purpose of computing net income, and are properly allocable to or chargeable against capital assets sold or exchanged during the taxable year.

(4) "Ordinary deductions" means the deductions allowed by section 23 other than capital losses and capital deductions.

(5) "Capital net gain" means the excess of the total amount of capital gain over the sum of (A) the capital deductions and capital losses, plus (B) the amount, if any, by which the ordinary deductions exceed the gross income computed without including capital gains.

(6) "Capital net loss" means the excess of the sum of the capital losses plus the capital deductions over the total amount of capital gain.

(7) "Ordinary net income" means the net income, computed in accordance with the provisions of this title, after excluding all items of capital gain, capital loss, and capital deductions.

(8) "Capital assets" means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in

the course of his trade or business. For the purposes of this definition—

(A) In determining the period for which the taxpayer has held property received on an exchange there shall be included the period for which he held the property exchanged, if under the provisions of section 113, the property received has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as the property exchanged.

(B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

(C) In determining the period for which the taxpayer has held stock or securities received upon a distribution where no gain is recognized to the distributee under the provisions of section 112 (g) of this title or under the provisions of section 203 (c) of the Revenue Act of 1924 or 1926, there shall be included the period for which he held the stock or securities in the distributing corporation prior to the receipt of the stock or securities upon such distribution.

(d) *Collection and payment of tax.*—The total tax determined under subsection (a) or (b) shall be collected and paid in the

same manner, at the same time, and subject to the same provisions of law, including penalties, as other taxes under this title.

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 101. CAPITAL NET GAINS AND LOSSES.

* * * * *

(c) *Definitions.*—For the purposes of this title—

* * * * *

(8) "Capital assets" means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. For the purposes of this definition—

(A) In determining the period for which the taxpayer has held property received on an exchange there shall be included the period for which he held the property exchanged, if under the provisions of section 113, the property received has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as the property exchanged.

(B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of

determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

(C) In determining the period for which the taxpayer has held stock or securities received upon a distribution where no gain is recognized to the distributee under the provisions of section 112 (g) of this Act or the Revenue Act of 1928, there shall be included the period for which he held the stock or securities in the distributing corporation prior to the receipt of the stock or securities upon such distribution.

(D) In determining the period for which the taxpayer has held stock or securities the acquisition of which (or the contract or option to acquire which) resulted in the nondeductibility (under section 118 of this Act or the Revenue Act of 1928, relating to wash sales) of the loss from the sale or other disposition of substantially identical stock or securities, there shall be included the period for which he held the stock or securities the loss from the sale or other disposition of which was not deductible.

* * * * *

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that—

* * * * *

(2) *Gifts after December 31, 1920.*—If the property was acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of the

donor or the last preceding owner by whom it was not acquired by gift. If the facts necessary to determine such basis are unknown to the donee, the Commissioner shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof. If the Commissioner finds it impossible to obtain such facts, the basis shall be the fair market value of such property as found by the Commissioner as of the date or approximate date at which, according to the best information that the Commissioner is able to obtain, such property was acquired by such donor or last preceding owner.

(3) *Transfer in Trust after December 31, 1920.*—If the property was acquired after December 31, 1920, by a transfer in trust (other than by a transfer in trust by a bequest or devise) the basis shall be the same as it would be in the hands of the grantor, increased in the amount of gain or decreased in the amount of loss recognized to the grantor upon such transfer under the law applicable to the year in which the transfer was made.

(4) *Gift or Transfer in Trust before January 1, 1921.*—If the property was acquired by gift or transfer in trust on or before December 31, 1920, the basis shall be the fair market value of such property at the time of such acquisition. The provisions of this paragraph shall apply to the acquisition of such property interests as are specified in section 402 (e) of the Revenue Act of 1921, or in section 302 (f) of the Revenue Act of 1924 or the Revenue Act of 1926 (relating to property passing under power of appointment) regardless of the time of acquisition.

(5) *Property Transmitted at Death.*—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the the day of the grantor's death.

* * * * *

(13) *Property Acquired before March 1, 1913.*—In the case of property acquired before March 1, 1913, if the basis otherwise determined under this subsection, adjusted as provided in subsection (b), is less than the fair market value of the property as of March 1, 1913, then the basis shall be such fair market value. In determining the fair market value of stock in a corporation as of March 1, 1913, due regard shall be given to the fair market value of the assets of the corporation as of that date.

Treasury Regulations 74, promulgated under the Revenue Act of 1928:

ART. 501. *Definition and illustration of capital net gain.*—

* * * * *

The term "capital assets" is defined to mean property held by the taxpayer for more than two years, whether or not connected with his trade or business, but not including stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. See articles 101–108 with reference to inventories. A dealer in securities is not entitled to the benefits of section 101 with reference to gain from the sale of securities. The specific property sold or exchanged must in general have been held for more than two years. However, in determining the period for which the taxpayer has held stock or securities received upon a distribution in connection with a reorganization where no gain is recognized to the distributee under the provisions of section 203 (c) of the Revenue Acts of 1924 and 1926 and section 112 (g) of the Revenue Act of 1928 (see article 576), there shall be included the period for which the taxpayer held the stock or securities in the distributing corporation prior to the receipt of the stock or securities upon such distribution. If the taxpayer has held for more than two years stock upc which a stock dividend has been declared, both the original and dividend shares are considered to be capital assets. If under the provisions of section 113

property received in an exchange has for the purpose of determining gain or loss the same basis in whole or in part in the taxpayer's hands as the property exchanged therefor, the property received in exchange is considered to be capital assets if the total period during which such property and the original property have been held is more than two years. If property is acquired from any person, and under the provisions of section 113 has the same basis in whole or in part for the purpose of determining gain or loss as it would have in the hands of the person from whom acquired, there shall be included in determining the period for which the taxpayer has held such property the period for which it was held by such person. For instance, in the case of property acquired after December 31, 1920, either by gift or by transfer in trust, the period for which the property was held by the donor shall be added to the period for which the property was held by the donee in determining whether the property was held for more than two years. (See articles 593 and 594.)

* * * * *

Treasury Regulations 77, promulgated under the Revenue Act of 1932:

ART. 58. *Sale of stock and rights.*—When shares of stock in a corporation are sold from lots purchased at different dates or at different prices and the identity of the lots cannot be determined, the stock sold shall be charged against the earliest purchases of such stock. In the determination of the earliest purchases of stock the rules prescribed in subparagraphs (A), (B), (C), and (D) of section 101 (c) (8) (relating to the period for which property has been held) shall be applied. * * *

ART. 591. *Basis (unadjusted) of property.*—The basis (unadjusted) of property is, in general, the cost of such property. This general rule is, however, subject to the exceptions set forth in section 113 and articles 592–604 and 606. The term "basis" as used in this article and articles 592–604 and 606 means the basis provided in such articles before the adjustments required by section 113 (b) and article 605 are made.

ART. 596. *Property transmitted at death.*—In the following cases the basis of property acquired after February 28, 1913, shall be the fair market value of the property at the time of the death of the decedent:

(1) Personal property acquired by specific bequest;

(2) Real property acquired by general or specific devise or by intestacy; and

(3) Property, whether real or personal, in the hands of a decedent's estate, acquired by the estate from the decedent (see article 863).

In all other cases where the property was acquired either by will or by intestacy after February 28, 1913, the basis shall be the fair market value of the property at the time of its distribution to the taxpayer.

* * * * *

If the property was acquired prior to March 1, 1913, the basis shall be determined as provided in section 113 (a) (13) and article 606.

For the purposes of this article, the value of property as appraised for the purpose of the Federal estate tax or in the case of estates not subject to that tax, its value as appraised in the State court for the purpose of State inheritance taxes shall be deemed to be its fair market value at the time of the death of the decedent.

ART. 600. *Stock or securities distributed in reorganization—*

* * * * *

(4) Where the stock in respect of which a distribution in reorganization is made was purchased at different times or at different prices, and the stock or securities distributed in reorganization cannot be identified as having been distributed in respect of any particular lot of such stock, then any sale of the stock or securities distributed in reorganization will be presumed to have been made from the stock or securities distributed in respect of the earliest purchased stock.

ART. 606. *Property acquired before March 1, 1913.*—In the case of property acquired before March 1, 1913, if the basis otherwise determined under section 113 (a), adjusted to March 1, 1913, in accordance with section 113 (b), is less than the fair market value of the property as of March 1, 1913, then the basis is such fair market value.

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No. 472

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

vs.

RICHARD VAN NEST GAMBRILL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENT.

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INDEX.

	PAGE
OPINIONS BELOW AND JURISDICTION	1
QUESTIONS PRESENTED	2
STATUTES INVOLVED	2
STATEMENT	2
ARGUMENT:	
POINT I—The basis of all the securities is fixed by the third sentence of section 113 (a) (5) of the Revenue Act of 1928. It is the value of the securities at the time when the trustees delivered them to Mr. Gambrill in accordance with the terms of the will	5
(A) The purpose and application of subparagraph (5) of section 113 (a)	7
(B) Construction of the phrase "value of the property at the time of the distribution to the taxpayer"	17
POINT II—If the basis issue considered under Point I was correctly decided below, the securities which Mr. Gambrill sold within two years from the time he received them as remainderman were not "capital assets"	24
LAST POINT—The decision of the Circuit Court of Appeals for the Second Circuit should be affirmed	29
APPENDIX	31

CITATIONS.

CASES: PAGE

Augustus v. *Commissioner* (decided Feb. 14, 1941), reported in 414 C. C. H. Federal Tax Service, par. 9255 20
Anderson v. *Wilson*, 289 U. S. 20 16

Becker v. *Anchor Realty & Investment Co.*, 71 F. (2d) 355 18
Brewster v. *Gage*, 280 U. S. 327 ..... 19, 21
Brinton, Lillian M., 28 B. T. A. 472 18

Campbell, Majorie K., 112 F. (2d) 530 ..... 1, 3, 18
Clyde v. *Commissioner*, 32 B. T. A. 799 18
Colgate, Mary, 27 B. T. A. 506, reversed by stipulation 18

Fleming, Margaret E. B., 36 B. T. A. 773 ..... 14, 18

Gowran, Helvering v., 302 U. S. 238 ..... 8, 16

Harbison, Ralph W., 26 B. T. A. 896, reversed on another issue 68 F. (2d) 1004 18
Hartley v. *Commissioner*, 295 U. S. 216 16

Jenkins v. *Smith*, 21 F. Supp. 433, reversed on other grounds 99 F. (2d) 827 18

Knox, Seymour H., 112 F. (2d) 530 ..... 1, 3, 18
Koshland v. *Helvering*, 298 U. S. 441 ..... 8, 16

Lane v. *Corwin*, 63 F. (2d) 767, cert. denied 290 U. S. 644 18
Libbey, Commissioner v., 100 F. (2d) 458 ..... 13, 18, 24
Lyeth v. *Hoey*, 305 U. S. 188 ..... 9, 10

McDowell, Matter of, 178 App. Div. 243, 164 N. Y. Supp. 1024 21
McFeely v. *Commissioner*, 296 U. S. 102 ..... 27, 28
McKinney v. *United States*, 62 Ct. Cls. 180, cert. denied 273 U. S. 716 19

CASES: PAGE

Maguire v. *Commissioner*, 111 F. (2d) 843, No. 346 present Term 3, 6, 14, 18
Matthiessen v. *United States*, 65 Ct. Cls. 484, cert. denied 278 U. S. 609 19
Old Colony Railway Co. v. *Commissioner*, 284 U. S. 552 23
Reynolds v. *Commissioner*, 114 F. (2d) 804, cert. granted February 17, 1941 ..... 13, 20
Robinson, Matter of, 155 Misc. 855, 280 N. Y. Supp. 687 21
Robinson v. *Commissioner*, 59 F. (2d) 1008 15
Rogers, Dorothy K. G., 112 F. (2d) 530 ..... 1, 3, 18
Salvage v. *Commissioner*, 76 F. (2d) 112, aff'd 297 U. S. 106 15
San Joaquin Fruit & Investment Co., Helvering v., 297 U. S. 496 28
Schliemann, Matter of, 259 N. Y. 497 22
United States v. *Merriam*, 263 U S. 179 23
United States v. *Van Nostrand*, 94 F. (2d) 510, aff'g 18 F. Supp. 295 18
Van Vranken v. *Helvering*, 115 F. (2d) 709 20
Whiting v. *Hudson Trust Co.*, 234 N. Y. 394 28

Statutes:

Revenue Act of 1918, c. 18, 40 Stat. 1057:
Sec. 202 8

Revenue Act of 1928, c. 852, 45 Stat. 791:
Sec. 22 ..... 8, 9, 31
Sec. 101 ..... 24, 31
Sec. 111 ..... 7, 23, 32
Sec. 113 ..... 5, 7, 15, 23, 32
Sec. 701 ..... 23, 26, 34

PAGE

Revenue Act of 1932, c. 209, 47 Stat. 169:
Sec. 22 9
Sec. 113 18
Revenue Act of 1934, c. 277, 48 Stat. 680:
Sec. 113 16

Miscellaneous:

G. C. M. 10260, XI-1, C. B. 79 19
O. D. 727, 3 Cum. Bull. 53 19
Conference Report No. 1882, 70th Cong., 1st Sess., p. 14 20
H. of R. Report No. 2, 70th Cong., 1st Sess., p. 18 20
Joint Committee Report, Vol. 1, p. 17 20
Senate Report No. 960, 70th Cong., 1st Sess., p. 26 ..... 11, 20
Treasury Regulations 33 (1918 Revision) par. 44 8
Treasury Regulations 86, Art. 113 (a) (5)-1 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 472

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

vs.

RICHARD VAN NEST GAMBRILL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENT.

Opinions Below and Jurisdiction.

The opinion of the Board of Tax Appeals (R. 9-17) is reported in 38 B. T. A. 981. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 29-35), affirming the Board's decision in the instant case and also the Board's decisions in the related *Campbell, Knox* and *Rogers* cases (Nos. 473, 474 and 475, present Term), is reported in 112 F. (2d) 530.

The judgment of the Circuit Court of Appeals was entered June 28, 1940 (R. 35). The petition for certiorari was filed September 28, 1940, and was granted November 12, 1940 (R. 36). The jurisdiction of this Court rests on section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

In 1930 the taxpayer, Mr. Gambrill, sold certain securities which had been delivered to him in 1928 as remainderman of a testamentary trust upon the death of the life beneficiary. Some of these securities had been part of the corpus of the trust since the time of its creation in 1898, and others had become part of the trust corpus through action of the trustees in reinvesting the trust estate pursuant to powers given them in the will.

The questions here presented relate to the computation of Mr. Gambrill's income tax liability in connection with these sales, namely:

1. Under the Revenue Act of 1928, what is the "basis" for determining Mr. Gambrill's gains or losses from the sales of the securities?

2. Should those securities which Mr. Gambrill sold within two years from the date when the trust terminated and the securities were delivered to him by the testamentary trustees be treated as "capital assets" within the meaning of the capital gain and loss provisions of the Revenue Act of 1928?

Statutes Involved.

The statutes involved are set forth in the Appendix, *infra*, pages 31 to 34.

Statement.

This case involves the income tax of the respondent, Richard Van Nest Gambrill, for the year 1930. The amount of the tax deficiency asserted by the Commissioner of Internal Revenue is $11,753.40 (R. 5).

The Board of Tax Appeals decided all issues in favor of Mr. Gambrill. The Circuit Court of Appeals for the

Second Circuit reviewed the case in connection with the related *Campbell, Knox* and *Rogers* cases (Nos. 473-475, present Term) in which the Board of Tax Appeals likewise had rendered decisions favorable to the taxpayers, and in a single opinion it unanimously affirmed the Board's decisions in all four cases (R. 35). This Court granted certiorari in all of the cases, pursuant to a petition of the Commissioner which alleged that they were in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *Maguire* v. *Commissioner,* No. 346, present Term.

The facts of the instant case were stipulated (R. 24-28). The following is a summary of the Findings of Fact made by the Board of Tax Appeals (R. 10-13):

On November 20, 1897, Mr. Gambrill's grandmother, Mary Van Nest, died testate a resident of the State of New York (R. 10). Her will, so far as here material, directed that a portion of her residuary estate be held in trust for the benefit of Mr. Gambrill's mother, Anna Van Nest Gambrill, during her life with full power in the trustees to invest and reinvest in their discretion without any limitations whatsoever; and that at her death the same be transferred and delivered "as she if leaving issue shall by will direct or in the absence of such direction, to her issue equally, or if she shall leave no issue," then to others as directed in the will (R. 10).

On January 4, 1898, the trust was set up in accordance with the terms of the will and the executors delivered to themselves as trustees certain common and preferred stocks (R. 10-11). The trust continued in existence for a period of more than thirty years until the death of the life beneficiary on March 23, 1928 (R. 11-12). During that period the trustees, acting under those provisions of the will which gave them unlimited power to invest and reinvest in their discretion, made a number of changes in the securities included in the corpus (R. 12-13).

In the original appraisal of the estate of Mary Van Nest, which was filed for the purpose of determining inheritance

tax under the then existing law of the State of New York, the appraiser reported that the value of the remainder interest of this trust was not at that time ascertainable. Accordingly, the assessment of the inheritance tax was suspended until such time as the person or persons beneficially entitled to the remainder should come into possession and enjoyment thereof, and the tax was made a lien upon the property transferred to the trustees. That lien continued in force throughout the period of the trust (R. 11).

On March 23, 1928, the life beneficiary, Anna Van Nest Gambrill, died without having exercised her power of appointment and leaving Mr. Gambrill, the respondent herein, as her sole surviving issue (R. 11). Thereupon the trustees procured an order from the Surrogate's Court of New York County assessing the inheritance tax on the value of the remainder interest passing to Mr. Gambrill (R. 11-12); and they sold certain of the trust property to provide funds for payment of that tax and other charges (R. 12). On May 5, 1928, the trustees delivered the balance of the corpus of the trust to Mr. Gambrill, as remainderman, "in accordance with the terms of the will of Mary Van Nest" (R. 12).

In February, 1930, on May 6, 1930, and in June, 1930, Mr. Gambrill sold certain of the securities which the trustees had delivered to him (R. 12). Some of these were securities which the trustees had received from the executors upon the creation of the trust in 1898, and others were securities which the trustees had purchased as reinvestments of the trust estate (R. 12-13).

Mr. Gambrill, in computing his gain or loss on each security for income tax purposes, used as his basis the fair market value of the security on May 5, 1928, the date on which he had received it from the trustees (R. 12). In computing his capital gains and losses, he regarded as a "capital asset" each security which at the time of its sale had been in his possession for more than two years from

May 5, 1928 (R. 13). This computation disclosed that, as a result of all the sales, he had incurred an ordinary loss of $5,550.57 and a capital net loss of $25,092.94 (R. 8):

The Commissioner of Internal Revenue, in his notice of tax deficiency, redetermined the amounts of the gains and losses by using the bases which would have been applicable if the securities had been sold by the trustees (R. 6-7); for those securities which had been acquired by the trustees prior to March 1, 1913, either by distribution from the executors or by purchase, he used the March 1, 1913 value, and for those securities which had been purchased by the trustees after March 1, 1913, he used the cost to the trustees (R. 7, 8). Also, he treated all the securities as "capital assets," on the theory that Mr. Gambrill had held them from the date of the testatrix's death or from the dates of their purchase by the trustees (R. 13, 27-28). By such computation he concluded that Mr. Gambrill had derived a capital net gain from all the securities of $60,053.32 (R. 8), and that there was a deficiency in tax of $11,753.40 (R. 5).

ARGUMENT.

POINT I

The basis of all the securities is fixed by the third sentence of section 113 (a) (5) of the Revenue Act of 1928. It is the value of the securities at the time when the trustees delivered them to Mr. Gambrill in accordance with the terms of the will.

The controversy in regard to the basis for determining gains and losses on the securities here involved is centered upon the application and construction of the third sentence of section 113 (a) (5) of the Revenue Act of 1928 (*infra*, pp. 32-33). This sentence provides in substance that the basis of all "property * * * acquired either by will or by in-

testacy," except real estate and specifically bequeathed personalty, is "the fair market value of the property at the time of the distribution to the taxpayer."

In the opinions below, both the Board of Tax Appeals and the Circuit Court of Appeals for the Second Circuit held unanimously that the provisions of this sentence were applicable to all the securities, on the ground that Mr. Gambrill had acquired all of them by will; and that the phrase, "value of the property at the time of the distribution to the taxpayer," fixed the basis at the value of the securities when they were delivered to Mr. Gambrill on May 5, 1928.

The Government, in claiming error, makes two principal contentions:

1. It contends that the third sentence of section 113 (a) (5) applies only to part, not to all, of the securities which Mr. Gambrill received as remainderman. Its position is that the phrase, "property * * * acquired * * * by will," should be so construed as to make this sentence inapplicable to any of the securities which had become part of the trust estate through reinvestment by the trustees, and that the basis of such securities to Mr. Gambrill is their cost to the trustees (*Maguire* brief, pp. 27-28, 36-37).(1)

2. It contends that the phrase "time of the distribution to the taxpayer," when applied to those securities which had been part of the original trust estate, means the date when the executors transferred the trust estate to themselves as trustees in 1898, and that the basis of those securities to Mr. Gambrill is their value on that date. (*Maguire* brief, p. 16.) It makes no suggestion as to how this phrase should

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(1) The Government in its brief in the instant case (p. 19) has incorporated by reference the argument in its brief in *Maguire* v. *Helvering*, No. 346, present Term.

be construed in respect of those securities which were reinvestments of the trust estate, if it is held that the third sentence of section 113 (a) (5) is applicable to all of the property which Mr. Gambrill received as remainderman.

The following argument is directed toward these two contentions, for all other contentions made by the Government in respect of the basis issue are incidental thereto.

(A) The purpose and application of subparagraph (5) of section 113 (a).

The Revenue Act of 1928 clearly and specifically declares how gain or loss from the sale of property shall be determined. Section 111 provides in substance that it shall be the difference between "the amount realized" and "the basis provided in section 113"; and section 113 (a) states that the basis shall be "the cost of such property," except that if the facts cause one of the twelve subparagraphs to be applicable the basis of the property shall be that prescribed in such applicable paragraph. The parties agree that paragraph (5) is the only one of these subparagraphs which has any possible application in the present case, and that the pertinent provisions of this paragraph are contained in the third sentence. It is evident therefore that the basis of each of the securities which Mr. Gambrill sold must be either "the cost of the property" as prescribed by the general provision of section 113 (a) or the "value of the property at the time of the distribution to the taxpayer" as prescribed by the third sentence of subparagraph (5), for no other basis is authorized by the statute.(2)

---

(2) The Government agrees (brief herein p. 3, footnote 1) that the provisions of section 113 (b), pertaining to property acquired before March 1, 1913, need not be considered for, if applicable, the material portion of those provisions incorporates section 113 (a) (5) by reference.

The purpose of subparagraph (5), as its terms and position in the statute disclose, is to provide an exception to the "cost of the property" rule in cases where the taxpayer acquired the property either by will or under laws of intestate succession. Property thus acquired ordinarily costs the taxpayer nothing and, as its value at the time of receipt is excluded from gross income under section 22 (b) (3), no constructive cost is established through subjecting the item to income tax as is sometimes done in the case of taxable stock dividends, bonuses and extra compensation for personal service. Thus property of this character has no "cost" and, if subparagraph (5) had not been enacted (or is found inapplicable), its basis under the general provision of section 113 (a) would be zero. Cf. *Helvering* v. *Gowran*, 302 U. S. 238 (1937). The inequitable result would be that tax-exempt inheritances could not be liquidated without making the whole of the proceeds taxable.

This conclusion finds support in the action taken by the Treasury Department in administering the various income tax statutes enacted prior to 1921, none of which contained any specific provision comparable to subparagraph (5). In the Revenue Act of 1918 (Sec. 202) the only basis provided for determining gain or loss on the sale of assets was cost or March 1, 1913 value. The Treasury Department, recognizing the inadequacy of this provision, promulgated a regulation which stated that the basis of property acquired by "inheritance" was the "appraised value at the time of the death of the testator" (Reg. 33 (1918 revision), par. 44). Since this basis was not authorized by statute, the regulation may have been invalid (Cf. *Koshland* v. *Helvering*, 298 U. S. 441, 447 (1936)); but whether valid or not, the regulation shows that from the time of the earliest income tax statutes, the "cost of the property" rule has been deemed inappropriate and inapplicable in fixing the basis of property acquired tax-free either by will or by inheritance. At all times since 1921, the Revenue Acts have provided specifically an ex-

ception to the "cost of the property" rule similar to that contained in subparagraph (5) of section 113 (a).

The Government apparently agrees that the purpose of subparagraph (5) is that stated above, and that under the general provisions of section 113(a) the "cost" of tax-exempt inheritances would be zero (*Maguire* brief, p. 15). Also it agrees that the third sentence of subparagraph (5) controls the basis of any property received by the remainderman of a testamentary trust which either had been owned by the testator or had been purchased by the executors as a reinvestment of the estate (brief herein, p. 20). It disagrees however that this provision also controls the basis of any property included in the remainder which was a reinvestment of the trustees. Its contention is that reinvestments of testamentary trustees when distributed to the remainderman may not be regarded as "property * * * acquired * * * by will."

It is respectfully submitted that such construction and application of section 113 (a) (5) is unwarranted. As will be hereinafter demonstrated, it finds no support in related provisions of the statute or in the legislative history of this particular provision, and it conflicts with the weight of judicial authority. Moreover, since subparagraph (5) was enacted to provide substantial bases for property which a beneficiary receives tax-exempt and without cost, its application should not be subjected to unexpressed limitations which would in a large measure defeat its purpose.

Some indication of the scope of subparagraph (5) is found in the application of section 22 (b) (3) which provides the exemption for "property acquired by * * * bequest, devise or inheritance." As has been noted above, section 113 (a) (5) is closely related to this exemption provision for it was intended to provide bases for tax-exempt inheritances; and since it is couched in even more general terms the presumption is that its application is at least co-extensive.

In *Lyeth* v. *Hoey*, 305 U. S. 188 (1938), the application of section 22 (b) (3) of the Revenue Act of 1932 (identical

in the 1928 Act) was considered by this Court. The Government there contended that the exemption provision should be construed narrowly, and that property received by an heir in compromise of a will contest should not be exempt but should be taxed in full as income.(3) The Court rejected these contentions with the following statement (p. 194):

> "In exempting from the income tax the value of property acquired by 'bequest, devise, or inheritance,' Congress used comprehensive terms embracing all acquisitions in the devolution of a decedent's estate. * * * Thus the acquisition by succession to a decedent's estate whether real or personal was embraced in the exemption."

Certain it is that the exemption provided by section 22 (b) (3) is not lost to beneficiaries and remaindermen if the executors or testamentary trustees, acting under powers granted them in the will, invest or reinvest the estate entrusted to them. In some cases the specific property which the testator had owned may be too speculative for fiduciaries to hold, and prudent administration may require that it be converted into other property of more conservative character. In other cases, securities of the estate or trust may

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(3) The Government in its brief (*Lyeth* v. *Hoey*, No. 48, October Term 1938) said (p. 25):

> "But it [the word inheritance] is not applicable, in a loose sense, to all distributions of a decedent's estate, even under supervision of a probate court. * * * The exemption applies only to property received from a decedent, to which the taxpayer was entitled to succeed by virtue of the laws regulating intestate succession."

On page 40 of the brief the following comment was made regarding section 113 (a) (5):

> "This provision, which is obviously *in pari materia* with the exemption from income accorded by Sec. 22 (b) (3), applies only to property which was actually part of the decedent's estate * * *."

mature or be called for redemption, and the fiduciary may find it necessary to make new investments in order to protect the income of those beneficially interested. All such reinvestments become part of the devolving estate, and when distributed to the beneficiary or remainderman, they are exempt from tax under section 22 (b) (3) as property acquired by "bequest" or "inheritance."

For the same reasons, it is submitted, the basis provided by the third sentence of section 113 (a) (5) is not lost to the beneficiary or remainderman under similar circumstances. It cannot be presumed that Congress, in using the comprehensive terms, "property * * * acquired either by will or by intestacy," overlooked the necessity for prudent handling of testamentary trusts or intended that the special basis provisions prescribed in this sentence should become inapplicable if the specific assets originally received by the fiduciary were not held intact and distributed without any reinvestment being made.

Other indications that section 113 (a) (5) was intended to be comprehensive are found in its legislative history. When the Revenue Bill of 1928 was before the Senate Finance Committee, subparagraph (5) was revised to include the first three sentences of the paragraph as finally enacted; and the following explanation of the change was reported (Finance Committee Report No. 960, 70th Cong., 1st Sess., p. 26):

> "It appears that the House bill is inadequate to take care of a number of situations which frequently arise. For example, the executor, pursuant to the terms of the will, may purchase property and distribute it to the beneficiaries, in which case it is impossible to use the value at the decedent's death as the basis for determining subsequent gain or loss, for the decedent never owned the property. Moreover, the fair market value of the property at the decedent's death can not properly be used as the basis, in the case of property transferred in contemplation of death where the donee sells the property while the donor is living."

The Committee then stated in respect of the third sentence of section 113 (a) (5):

> "It would also apply in cases where the executor purchases property and distributes it to the beneficiary."

In view of the foregoing history, the Government concedes (brief herein, p. 20) that the provisions of section 113 (a) (5) apply to property received by a remainderman which had been purchased by the executors. That concession, however, is not adequate to give effect to the obvious intention of Congress to make subparagraph (5) sufficiently comprehensive to cover all property distributed under the terms of a will or the laws of intestate succession. The Senate Committee referred to property purchased by executors merely as one example "of a number of situations which frequently arise" where it was considered advisable to have the special basis provisions apply. There is no indication that reinvestments of testamentary trustees were intended to be excluded. Property purchased by any fiduciary under power given him in the will becomes part of the devolving estate.

In the present case the application of the third sentence of section 113 (a) (5) appears irrefutable, for Mr. Gambrill acquired all his rights and interests in all of the securities by the will of Mary Van Nest. That will prescribed the line of succession, it authorized the trustees to invest and reinvest the property entrusted to them, it determined when the trust should be terminated and it declared how the property remaining should be distributed. Moreover, at the time of this distribution the value of the remainder interest delivered to Mr. Gambrill was taxed under the local law of the State of New York as an inheritance. (R. 11-12).

The court below held that the third sentence of section 113 (a) (5) was applicable to all the securities here involved; and it rejected the Government's contention that this statute

did not apply to securities which had been purchased by the trustees, with the following statement (R. 33):

> "This requires a most technical interpretation of the clause [third sentence] and one that in our opinion is not sound even technically. Any property distributed by a trustee which is part of the corpus of the trust is acquired through and by virtue of the will. Through the will the remaindermen derived all their interests and without it they would have had no standing and would have received nothing. *Lyeth* v. *Hoey*, 305 U. S. 188, 194-195."

In *Reynolds* v. *Commissioner*, 114 F. (2d) 804 (C. C. A. 4th—1940), certiorari granted February 17, 1941, one of the issues was the basis under the 1934 Act of securities purchased and distributed by a testamentary trustee. The court said (p. 813):

> "The Commissioner points to no provision of the statute, other than §113 (a) (5), as applicable to such a situation, * * * ."

The court also said (p. 813):

> "In our opinion, §113 (a) (5) of the Act covers securities purchased by the trustee in the administration of the estate and distributed to the taxpayer, as well as securities received by the trustee from the decedent's estate and similarly distributed. * * * We are in accord with the views expressed upon a similar question under the Revenue Act of 1928 in *Commissioner* v. *Gambrill*, 2 Cir., 112 F. 2d 530, 533. Cf. *Commissioner* v. *Maguire*, 7 Cir., 111 F. 2d 843."

In *Commissioner* v. *Libbey*, 100 F. (2d) 458 (C. C. A. 1st —1938), testamentary trustees acquired preferred stock by sale or exchange and distributed it to the beneficiaries. The Government apparently agreed that section 113 (a) (5) of the 1932 Act controlled and based its case solely upon the construction of that paragraph. The court held that this subparagraph was applicable.

In *Margaret E. B. Fleming,* 36 B. T. A. 773 (1937), the Government took a position precisely opposite to that which it is taking here. It opposed the taxpayer's contention that the basis of stock which had been purchased and distributed by the testamentary trustee was "cost" to the trustee; and it requested the Board to hold that the third sentence of section 113 (a) (5) of the Revenue Act of 1928 was applicable. The Board agreed and made the following statement in its opinion (p. 777):

> "* * * our immediately pertinent question is not *when* but *how* the petitioner, remainderman under the will of her father, not the trustee, acquired these securities. * * * But the testamentary trustee was not the agent of petitioner, the remainderman. The trustee was the creature of the decedent, made so by his will. It was thus designated as the continuing instrumentality of the decedent to execute his and not the will of the petitioner, remainderman. She neither controlled the terms of the trust nor its res until distributed to her. * * * Thus, it was by virtue of the provisions of the testamentary trust created by the will of her father, that petitioner was the remainderman under that trust and received the securities in question. They may have been purchased by the trustee, but the petitioner acquired them by will."

This decision has been followed by the Board, in all similar cases, including the five cases here being considered (Nos. 346, 472, 473, 474 and 475, present Term).

The only decision to the contrary is that of the Seventh Circuit in the *Maguire* case (No. 346), which reversed the Board of Tax Appeals.

Assume, *arguendo,* that the Government is correct in its contention that those securities which had become part of the trust estate through reinvestment of the trustees were not, on distribution, acquired by Mr. Gambrill "by will." In such situation section 113 (a) (5) would not be applicable; but, we submit, the basis of the securities would nevertheless be the same as if it applied, i. e., their value on

the date of distribution. If the property was not acquired by will, it was not exempt from income tax at the time of receipt; and, being subject to tax at that time to the extent of its fair market value, that value would become its constructive "cost" basis for determining gain or loss on any subsequent sale. It is true that no income tax was paid upon the receipt of the property; but that fact is immaterial since estoppel is not pleaded and no grounds to support such a plea are present. Property which was subject to income tax at the time of receipt has, in the absence of estoppel, a basis equal to its fair market value at the time of such receipt. See *Robinson* v. *Commissioner*, 59 F. (2d) 1008 (C. C. A. 6th—1932); *Salvage* v. *Commissioner*, 76 F. (2d) 112 (C. C. A. 2d—1935), aff'd 297 U. S. 106 (1936).

There is no merit in the Government's suggestion (*Maguire* brief, pp. 36-37) that, if section 113 (a) (5) is not applicable, "it would be fair to assume" that the basis of those securities which were reinvestments of the trust estate is the cost to the trustees, rather than either the actual or constructive "cost" to Mr. Gambrill. Neither in the general provision of section 113 (a) nor elsewhere in the statute is there any authority for fixing a beneficiary's basis with regard to the manner in which testamentary trustees had obtained the property, or the price which such trustees may have paid for it, or the basis which such trustees would have been required to use if they had sold it. Nor is there any statutory authority for determining a beneficiary's basis by substituting the basis of testamentary trustees or any other prior owner; where Congress has intended that the basis of a prior owner should be substituted, it has made specific provision therefor (See subparagraphs (2), (3), (8) and (11) of section 113 (a)). The revenue acts regard a fiduciary as a distinct taxable entity whose income is computed, returned and taxed in the same manner as that of an individual; and where, as here, he is not the person who sold the property and derived the taxable gain, he is not the taxpayer and the determination of his basis is not a material consideration. *Hartley* v. *Commissioner*, 295 U. S.

216, 218 (1935); *Anderson* v. *Wilson*, 289 U. S. 20, 27 (1933). This court recognized in *Helvering* v. *Gowran, supra* (p. 244), that gain from the sale of property is the difference between the amount realized and the cost of the property "to the taxpayer." Also it held in *Koshland* v. *Helvering, supra* (p. 447), that where Congress has clearly and specifically declared how taxable gain shall be measured, the Secretary of the Treasury is without power by regulatory amendment to determine the gain by use of a basis which is not authorized by the statute.

Moreover, the reference which the Government makes (*Maguire* brief, p. 37) to article 113 (a) (5)-1 (d) of Treasury Regulations 86 (1934 Act)(4) weakens its position. That article, as its number indicates, pertains to subparagraph (5) rather than to the general provision of section 113 (a); and its purpose is to show how the doctrine of relation which is announced in the preceding paragraphs of that article should be used in applying the revised provisions of section 113 (a) (5) of the 1934 Act. The article by thus interpreting subparagraph (5) implies that the special provisions of this paragraph rather than the general provision of section 113 (a) are applicable in fixing the beneficiary's basis of property which had been purchased by testamentary trustees in their administration of the estate. It tends to support the respondent's contention that such property is acquired by will or inheritance.

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(4) Section 113 (a) (5) of the Revenue Act of 1934, unlike the statute here involved, provides that the basis of property acquired "by bequest, devise or inheritance" is its value "at the time of such acquisition." Article 113 (a) (5)-1 of Treasury Regulations 86, in interpreting this provision, states that all titles to property acquired "by bequest, devise or inheritance" relate back to the death of the decedent; and subparagraph (d) of this article states that if the property is an investment by the fiduciary under a will, the cost or other basis of the fiduciary is taken in lieu of the value at the time when the decedent died.

It is respectfully submitted that all of the property which Mr. Gambrill received as remainderman was acquired by him "by will"; and that the third sentence of section 113 (a) (5) is applicable in determining its basis.

(B) Construction of the phrase "value of the property at the time of the distribution to the taxpayer."

The Circuit Court of Appeals for the Second Circuit, in its opinion below, made the following statements regarding the third sentence of section 113 (a) (5) and the principal contentions of the Government as to its construction (R. 32-33):

> "It is hard to imagine language which would more clearly fix the basis for computing the gain or loss realized upon the sales of the securities with which the Commissioner had to deal than the words 'fair market value of the property at the time of the distribution to the taxpayer.'
>
> * * * * *
>
> "The * * * contention of the Commissioner that the word 'taxpayer' as used in the third clause of Section 113 (a) (5) should be construed as meaning the 'trustee' and that the phrase 'time of the distribution to the taxpayer' ought to be interpreted as meaning 'the date when the executors transferred the property to the trustees,' seems to us without warrant. The taxpayers here are undoubtedly the respondents. The trustees are separate entities and as such are neither agents of the respondents nor mere passive fiduciaries. * * * To treat the trustee and beneficiary remainderman, as the Commissioner wishes us to do, as a 'sort of dual tax personality' is to disregard the plain language of the statute and to adopt a concept which seems to us to defy analysis. * * * the basis should be 'the fair market value at the time of the distribution to the taxpayer,' i.e., to the respondent whose income taxes are being reviewed, and not to the trustee."

The respondent submits that this holding is sound. It is directly supported by decisions of Circuit Court of

Appeals for the First Circuit in *Commissioner* v. *Libbey*, 100 F. (2d) 458 (1938), and *United States* v. *Van Nostrand*, 94 F. (2d) 510 (1938), aff'g 18 F. Supp. 295 (D. Mass. 1937); and by decisions of the Board of Tax Appeals in *Margaret E. B. Fleming*, 36 B. T. A. 773 (1937), *Lillian M. Brinton*, 28 B. T. A. 472 (1933), *Mary Colgate*, 27 B. T. A. 506 (1932) reversed by stipulation on another issue (C. C. A. 2d), *Ralph W. Harbison*, 26 B. T. A. 896 (1932) reversed on another issue 68 F. (2d) 1004 (C. C. A. 2d—1934), and also by the Board's decisions in the *Campbell, Knox, Rogers* and *Maguire* cases which are now before this court (Nos. 346, 473, 474 and 475).

The Government admits (*Maguire* brief, p. 25) that the point here involved was conceded by it in *Lane* v. *Corwin*, 63 F. (2d) 767 (C. C. A. 2d—1933), certiorari denied 290 U. S. 644 (1933); *Becker* v. *Anchor Realty & Investment Co.*, 71 F. (2d) 355 (C. C. A. 8th—1934); *United States* v. *Van Nostrand, supra*; and *Clyde* v. *Commissioner*, 32 B. T. A. 799 (1935). Also, it concedes (*Maguire* brief, p. 25) that the Bureau of Internal Revenue has not pursued a consistent construction of subparagraph (5), section 113 (a) of the Revenue Acts of 1928 and 1932; and that during the period 1933 to 1935 it construed this paragraph in a manner which accords with the decisions below.

The only judicial authority to the contrary is *Commissioner* v. *Maguire*, 111 F. (2d) 843 (C. C. A. 7th—1940), which is now before this Court (No. 346, present Term). The decision in *Jenkins* v. *Smith*, 21 F. Supp. 433 (D. Conn.—1937), may not be considered authoritative for, after being reversed by the Second Circuit on other grounds in 99 F. (2d) 827 (1938), it was impliedly overruled by that court on the present issue by being ignored in the opinion below.

The Government, in support of its contentions on this point, has discussed at length the basis provisions of the various revenue acts which were enacted in the years 1916 to 1926, inclusive, and also the provisions and regulations of the several Acts which have been in force since the

year 1934. Its position appears to be that the basis provisions of these statutes, none of which is here involved, reveal a general plan to use the value of property at the time of the decedent's death as the basis of the beneficiary; that, as a matter of policy, any departure from such general plan is undesirable; and that under the 1928 and 1932 Acts the departure can be minimized if the phrase "distribution to the taxpayer" is construed to mean distribution to the trustee (*Maguire* brief, pp. 6-8, 15-16).

That position is unsound. As will be shown, the basis provisions of the various revenue statutes enacted prior to 1928 were not interpreted either by the Treasury Department or the courts as prescribing a uniform rule that the basis of all inherited property was the value at the time of the decedent's death. The committees of Congress, in their consideration of the 1928 Revenue Bill, found that the basis requirements of these earlier Acts were indefinite and controversial; and they deliberately changed these provisions by including the third sentence of section 113 (a) (5) which has no counterpart in any of the prior statutes.

The earlier statutes merely provided that the basis of property acquired by bequest, devise or inheritance was its value "at the time of such acquisition." If any general plan was embodied in these terms, the Treasury failed to discover it. Various meanings were accorded to the above-quoted words in Treasury rulings and also in court decisions, depending upon whether the beneficiary's interest was legal, equitable, vested, contingent or otherwise.(5) It was not until after the decision of this Court in *Brewster* v. *Gage*, 280 U. S. 327 (1930), that any certainty as to the meaning of the phrase "at the time of such acquisition" was established. Even now, there is conflict between Circuit

(5) See for example: O. D. 727, 3 Cum. Bull. 53 (1920); G. C. M. 10260, XI-1 C. B. 79, 80 (1932); *Matthiessen* v. *United States*, 65 Ct. Cls. 484, cert. denied 278 U. S. 609 (1928); *McKinney* v. *United States*, 62 Ct. Cls. 180, cert. denied 273 U. S. 716 (1926).

Courts of Appeals as to how that phrase should be construed where the beneficiary's interest in the estate or trust was contingent. See *Reynolds* v. *Commissioner,* 114 F. (2d) 804 (C. C. A. 4th—1940), certiorari granted February 17, 1941; *Van Vranken* v. *Helvering,* 115 F. (2d) 709 (C. C. A. 2d, 1940); *Augustus* v. *Commissioner* (decided Feb. 14, 1941 —C. C. A. 6th) reported in 414 C. C. H. Federal Tax Service, par. 9255.

When the Revenue Bill of 1928 was under consideration by Congress, the Joint Committee on Internal Revenue Taxation recommended that the basis provisions of the earlier Acts, relating to inherited property be changed in order "to make the basis certain and definite." (Report of Joint Committee, Vol. 1, pp. 17, 74, 75). The House Committee on Ways and Means agreed that the term "acquisition" was "indefinite and has given rise to controversy"; and it provided in its Bill that the basis of such property be the value on the date of the decedent's death (H. of R. Report No. 2, 70th Cong., 1st Sess., p. 18). The Senate Finance Committee, however, concluded that the House Bill was "inadequate to take care of a number of situations which frequently arise"; and as examples, it referred to the situation where the property may have been purchased by the executor after the decedent's death and to the situation where the property may have been transferred by the decedent in contemplation of death (Senate Report No. 960, 70th Cong., 1st Sess., p. 26). Thereafter, when the Bill was reconsidered in the conference of both branches of Congress, another provision was added which pertained to revocable trusts (Conference Report No. 1882, 70th Cong., 1st Sess., p. 14). The result was that, when section 113 (a) (5) of the Revenue Act of 1928 was finally enacted, it provided not one basis but three:

1. In the case of personal property acquired by specific bequest, or real estate acquired by will or intestacy, the value "at the time of *the death of the decedent.*"

2. In the case of property acquired by the decedent's estate from the decedent, the value "at the time of *the death of the decedent.*"

3. In *all other cases* where the property was acquired either by will or intestacy, the value "at the time of *the distribution to the taxpayer.*"

In *Brewster* v. *Gage,* 280 U. S. 327 (1930), this Court commented upon this change as follows (p. 337):

> "The deliberate selection of language so differing from that used in the earlier Acts indicates that a change of law was intended. * * * There is no support for the suggestion that subdivision (5) expressed the meaning, or was intended to govern or affect the construction, of the earlier statutes."

The provisions of the third sentence of section 113 (a) (5) evidenced an intention by Congress to depart deliberately from the value-at-death rule, except in the cases specifically mentioned in the first two sentences; and similar provisions are not found in any prior revenue act. The third sentence obviously was intended as a catch-all to provide bases in numerous situations, such as those which the Senate Finance Committee cited as examples. If it is not construed so as to cover such situations, the intention of Congress will in a large measure be defeated.

Many situations would not be covered if the phrase "at the time of the distribution to the taxpayer" were construed, as the Government suggests, to mean the time when the executors deliver the property to the testamentary trustees. For example, there are many cases where the same persons are named both as executors and trustees, the powers of each office are not clearly defined in the will, there is no actual transfer of the property from executors to the trustees, and it is practically impossible to determine when the change of fiduciary capacity takes place. See: *Matter of McDowell,* 178 App. Div. 243 (1917), 164 N. Y. Supp. 1024; *Matter of Robinson,* 155 Misc. 855 (1935),

280 N. Y. Supp. 687; *Matter of Schliemann*, 259 N. Y. 497 (1932). There are cases, like the present one, where the property had not been held by the executors but became part of the trust estate through reinvestment by the trustees. There are other cases where the property did not pass through the hands of executors but was transferred by the decedent to trustees of a revocable trust, a situation which was intended to be covered by the third sentence of section 113 (a) (5) as is shown by the legislative history. Thus the construction for which the Government contends would not provide a basis which is comprehensive and definite, as the committees of Congress intended; it would lead only to uncertainty and confusion.

The Government's suggestion that the departure from the provisions of prior Acts was undesirable and that the unambiguous words of the third sentence of section 113 (a) (5) of the 1928 and 1932 Acts ought to be changed to minimize such departure, should be addressed to the Congress and not to the courts. The basis prescribed by this sentence was established by Congress in the exercise of its own judgment and presumably after consideration of all the supposed advantages and disadvantages suggested to it. It may be that Congress, in drafting the provisions of this sentence concluded that it would be inequitable to tax a beneficiary on increment which had accrued before he obtained any substantial interest in the estate or trust. It may have concluded that there would be less opportunity for tax avoidance if the basis were fixed at the time when the testamentary trust terminated on the death of the life beneficiary, than if it were fixed at such time as the executors elected to turn the property over to the trustees. Also it may have concluded that there were advantages in making the basis provisions definite by having them apply when the property actually came into the hands of the taxpayer.

The effect which the provisions of the third sentence of section 113 (a) (5) would have upon the revenue was not determinable at the time when the 1928 Act was enacted, for the results would depend on future economic conditions

and the facts pertaining to each particular case. In any situation where the property depreciated in value between the date of death and the date of distribution, a larger tax would result from fixing the basis value at "the time of the distribution to the taxpayer" than at the time of the testator's death. Moreover, the various basis provisions of section 113 of the 1928 Act show that Congress did not always elect to tax all increment. For example, under section 113 (a) (4) increment in the hands of a donor is not taxed to the donee; and under section 113 (a) (5) neither the increment in the hands of the testator nor the increment in the hands of the executor is taxed to one who receives a general bequest of personal property.

The weighing of all such considerations and the selection of the particular basis to be used lie within the province of the Congress; and its intentions can best be carried out by giving effect to the literal meaning of the words of the statute. In *United States* v. *Merriam*, 263 U. S. 179 (1923), this Court said (pp. 187-188):

> "But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used."

To the same effect see *Old Colony Railway Co.* v. *Commissioner*, 284 U. S. 552, 560 (1932).

The words of the third sentence of section 113 (a) (5) are free from ambiguity. The word "property" undoubtedly refers to the particular property sold, for that word is used also in section 111 where the measure of taxable gain is prescribed. The word "taxpayer" is defined in section 701 (a) (13) as "any person subject to a tax imposed by this Act." Accordingly, the plain and rational meaning of the phrase "value of the property at the time of the distribution to the taxpayer" is the value at the time when the property was delivered to the person who sold it and derived the taxable gain. In the instant case, it is the value of the securities at the time when they were delivered to Mr. Gambrill as remainderman on May 5, 1928.

In *Commissioner* v. *Libbey, supra,* the Circuit Court of Appeals for the First Circuit appropriately summarized the situation, as follows (p. 461):

> "The meaning of the third clause of the statute is so plain that it does not call for construction, at least in its application to the facts of this case. 'Distribution to the taxpayer' means what it says—delivery to the taxpayer. It does not mean delivery by the executors to the trustees, where the trustees are not the taxpayer. They are not the taxpayer here."

POINT II

If the basis issue considered under Point I was correctly decided below, the securities which Mr. Gambrill sold within two years from the time he received them as remainderman were not "capital assets."

The question here considered is whether those securities which Mr. Gambrill sold within two years from the time when he obtained them as remainderman of the testamentary trust were "capital assets" within the meaning of the capital gain and loss provisions (section 101) of the Revenue Act of 1928. This statute defines the term "capital assets," so far as is here material, as follows:

> "Sec. 101 (c) (8) 'Capital assets' means property held by the taxpayer for more than two years * * * For the purposes of this definition—
>
> * * * * * * *
>
> "(B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person."

This question is presented only in the event that the basis issue (considered under Point I) was correctly decided below and that the basis of the securities is their value at the time when they were delivered to Mr. Gambrill. There is no dispute that if the basis of the securities to Mr. Gambrill is the same as it would have been to the trustees, subparagraph (B) of section 101 (c) (8) is applicable (petitioner's brief, p. 26) and that the Government cannot establish prejudicial error on this issue (petitioner's brief, p. 22).

The Government's contention is that, even if the securities have a different basis in the hands of Mr. Gambrill than they would have had in the hands of the trustees, they should nevertheless be regarded as capital assets. Its position (brief, p. 21) is that the periods for which Mr. Gambrill held the securities should be computed (1) in the case of those securities which the testatrix had owned in her lifetime, from the time of the testatrix' death in 1897 and (2) in the case of those securities which had been reinvestments of the original trust estate, from the respective dates of their purchase by the trustees.

The Court below rejected that contention with the following statement (R. 34):

> "The Board held that they [the securities] were not [capital assets], and they plainly were not unless the period during which they were held by the trustees can be added to the period between the date of distribution to the taxpayers and the date of sale. There cannot be any such tacking because the property, when held by the respective respondents, did not have 'for the purpose of determining gain or loss from a sale * * *, the same basis * * * in his hands as it would have in the hands' of the trustees."

The respondent submits that the court's holding is correct. The term "capital assets" is a statutory concept and is dependent upon the period for which the taxpayer has

held the property. Since Congress has declared specifically in subparagraph (B) that such period shall include the period for which the property was held "by any other person" only where the taxpayer has the same basis as that other person, there is no warrant for including such prior period in a case, like the present, where the requirement of the statute cannot be met. Subparagraph (B) states expressly that it applies to "property however acquired." The term "taxpayer" is defined by section 701 (a) (13) to mean "any person subject to a tax imposed by this Act"; and in the present case it refers to Mr. Gambrill. The term "person" is defined by section 701 (a) (1) to include "a trust or estate." The plain and rational meaning of subparagraph (B) is, therefore, that if, under the provisions of section 113, the basis of the securities in the hands of Mr. Gambrill is the same as it would have been in the hands of the trustees, tacking of the respective periods of ownership is required; and conversely, if the basis to Mr. Gambrill is not the same, no tacking is permitted.

The Government agrees (brief, p. 26) that if its contentions with respect to the basis issue are sound, subparagraph (B) is called into operation; and it thereby impliedly concedes that the trustees held the securities until the time that the trust was terminated and that Mr. Gambrill held them thereafter until the time of their sale. It cannot argue consistently that, if its contentions with respect to the basis issue are unsound, Mr. Gambrill should be deemed to have held the securities from a time prior to the termination of the trust.

Moreover, the phrase "property held by the taxpayer" is not a term of art either in the law of property or in the law of income taxation; it should receive its ordinary and usual meaning. There is no reason for giving it a strained or unusual construction or for indulging the fiction of "relation" in order to ascertain its meaning.

The ordinary and accepted meaning of the word "held" is "owned" or "had as one's own." When it is said that a

person "held stock" in a corporation, it is commonly understood to mean that he was a stockholder of such corporation. In the specific statutory provision here involved (sec. 101 (c) (8)) the use of the phrases, "(whether or not connected with his trade or business)" and "primarily for sale in the course of his trade or business," to modify "property held by the taxpayer," indicates that Congress employed the word "held" in the sense of "owned."

The Government, in support of its position, relies upon *McFeely* v. *Commissioner*, 296 U. S. 102 (1935), which was distinguished in both of the decisions below. In that case no trust was involved. The taxpayers were respectively residuary legatees, the donee of a widow who had elected to take against her husband's will and one taking under the laws of intestate succession. This Court, in determining the period for which the taxpayers had held the property, stated that "to hold property is to own it"; and it concluded that under the particular facts there present the period of holding began on the date of the decedent's death. The Court apparently regarded the taxpayers as the substantial owners from that date, although they may not have been the title owners. It said (pp. 107-108):

> "Whether under local law title to personal property passes from a decedent to the legatee or next of kin at death subject to a withholding of possession for purposes of administration, or passes to the personal representative for the purposes of administration,—the title of the beneficiary, though derived through the executor relating back to the date of death,—is for present purposes immaterial."

In that case, the possession of the taxpayers was postponed merely for the administration of the estate which was of relatively short duration; and the powers and duties of the executor or administrator were limited. In cases like the present, where a trust is interposed, the period of postponement is ordinarily of longer duration and the

trustees have complete ownership of the property for the purposes of the trust.

Our conclusion that the Court intended in the *McFeely* case to apply the test of substantial ownership in determining the periods for which the taxpayers had held the property appears to find support in *Helvering* v. *San Joaquin Fruit & Investment Co.*, 297 U. S. 496 (1936). The opinions in both cases place emphasis upon the propriety of construing the words of the taxing statute according to their common usage. In the *McFeely* case, the Court said (p. 107):

> "In common understanding, to hold property is to own it. In order to own or hold one must acquire."

In the *San Joaquin* case, the Court said (p. 499):

> "The word 'acquired' is not a term of art in the law of property but one in common use. The plain import of the word is 'obtained as one's own.' Language used in tax statutes should be read in the ordinary and natural sense."

In the present case Mr. Gambrill acquired substantial ownership of the securities under the will at the time of the death of the life beneficiary; and he acquired title to the securities under the will at the time they were distributed to him by the trustees. He was not named in the will and, until after the life beneficiary's death, none of the securities in the trust were earmarked or set aside for him. It is well settled under the laws of New York that neither a life beneficiary nor a remainderman of a trust owns or holds any specific item of property composing the corpus of a trust. *Whiting* v. *Hudson Trust Co.*, 234 N. Y. 394, 407 (1923). Moreover, if additional issue of the life beneficiary had been born, Mr. Gambrill's share in the trust estate would have been reduced. Indeed, until he survived the life beneficiary and her power of appointment terminated upon her death, there was no certainty

that Mr. Gambrill ever would acquire or hold or own any of the property included in the trust estate.

It is unnecessary, as was pointed out by the Board of Tax Appeals in its opinion below (R. 17), to determine whether Mr. Gambrill's holding period began at the date of the life beneficiary's death when he became the substantial owner of the securities, or at the time when the trustees distributed the securities to him and he became the legal owner. None of the securities here involved was sold more than two years after either of these dates.

LAST POINT.

The decision of the Circuit Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

SIDNEY W. DAVIDSON
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Counsel for the Respondent.

Dated, New York, N. Y.,
February 25, 1941.

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APPENDIX.

Revenue Act of 1928, c. 852, 45 Stat. 791:

Sec. 22 (b). *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this title:

* * * * *

(3) *Gifts, Bequests, and Devises.*—The value of property acquired by gift, bequest, devise, or inheritance (but the income from such property shall be included in gross income); * * *.

Sec. 101. *Capital Net Gains and Losses.*

* * * *

(c) *Definitions.*—For the purposes of this title—

(1) "Capital gain" means taxable gain from the sale or exchange of capital assets consummated after December 31, 1921.

(2) "Capital loss" means deductible loss resulting from the sale or exchange of capital assets.

* * * * * *

(8) "Capital assets" means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. For the purposes of this definition—

(A) In determining the period for which the taxpayer has held property received on an exchange there shall be included the period for which he held the property exchanged, if under the provisions of section 113, the property received has, for the pur-

pose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as the property exchanged.

(B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

(C) In determining the period for which the taxpayer has held stock or securities received upon a distribution where no gain is recognized to the distributee under the provisions of section 112 (g) of this title or under the provisions of section 203 (c) of the Revenue Act of 1924 or 1926, there shall be included the period for which he held the stock or securities in the distributing corporation prior to the receipt of the stock or securities upon such distribution.

Sec. 111. *Determination of Amount of Gain or Loss.*

(a) *Computation of gain or loss.*—Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in section 113, and the loss shall be the excess of such basis over the amount realized.

Sec. 113. *Basis for Determining Gain or Loss.*

(a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * *

(5) *Property Transmitted at Death.*—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death;

* * * * *

(b) *Property acquired before March 1, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, shall be:

(1) the cost of such property (or, in the case of such property as is described in subsection (a) (1), (4), (5), or (12) of this section, the basis as therein provided), or

(2) the fair market value of such property as of March 1, 1913,

whichever is greater. In determining the fair market value of stock in a corporation as of March 1, 1913, due regard shall be given to the fair market value of the assets of the corporation as of that date.

Sec. 701. *Definitions.*

(a) When used in this Act—

(1) The term "person" means an individual, a trust or estate, a partnership, or a corporation.

* * * * *

(13) The term "taxpayer" means any person subject to a tax imposed by this Act.

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Nos. 473, 474, 475

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 473

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,
v.
MARJORIE K. CAMPBELL

No. 474

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,
v.
SEYMOUR H. KNOX

No. 475

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,
v.
DOROTHY K. G. ROGERS

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3
Summary of Argument	3
Argument	5
FIRST POINT: The basis for income tax purposes of the securities received by the respondents from the testamentary trustees is the fair market value thereof on the respective dates on which such securities were delivered to the respondents. This is true whether such securities were owned by the decedent at the date of his death or were purchased thereafter by the executors or the testamentary trustees	5
A. The construction and legislative history of Section 113(a)(5) of the Revenue Acts of 1928 and 1932	5
B. The basis of securities owned by the decedent at the date of his death and distributed to respondents by the testamentary trustees	13
C. The basis of securities purchased by the executors or testamentary trustees and distributed to respondents by the trustees	19
D. With respect to the Commissioner's basic assumption that there is a uniform Congressional scheme which requires a basis of value as of the date of death in the case of property acquired by inheritance	29
E. The Maguire Case	35

PAGE

SECOND POINT: Respondent Knox held the securities sold by him in 1930 for less than two years, within the meaning of Section 101(c)(8) of the Revenue Act of 1928. Hence the securities were not capital assets and his loss was not a capital loss..... 36

A. There is no authority in Section 101(c)(8) for tacking to the respondent's period of holding the prior period of holding by the testamentary trustees 36

B. The McFeely cases, upon which the Commissioner relies, did not involve an intervening trust and are not controlling in this case..... 38

C. In view of the uncertain and conditional nature of the respondent Knox's remainder interest, he held the securities which he sold in 1930 only from the date of his thirtieth birthday when his interest became indefeasible and the securities were distributed to him by the testamentary trustees 41

D. If considered material, the respondent Knox's remainder was, under the law of New York, contingent until he attained the age of thirty years on September 1, 1928..... 49

THIRD POINT: In applying the "first in, first out" rule the Woolworth stock purchased by the respondent Campbell prior to distribution to her by the testamentary trustees of other Woolworth shares must be deemed to be "first in" and must be regarded as sold first..... 52

Conclusion 56

Appendix A i

Appendix B viii

CITATIONS.

PAGE

Cases:

Anderson v. Wilson, 289 U. S. 20.....14, 15, 41

Archbold v. Helvering, 115 F. (2d) 1005..... 31

PAGE

Archer-Shee v. Garland [1931] A. C. 1222..... 41
Arrott, James W., Jr., 34 B. T. A. 133..... 8
Augustus v. Commissioner, decided February 14, 1941, C. C. A. 6th 31, 48
Backer v. Levy, 82 F. (2d) 270..... 40
Becker v. Anchor Realty & Investment Co., 71 F. (2d) 355 .....7, 46
Becker v. St. Louis Union Trust Co., 296 U. S. 48..... 43
Bedford, Edward T., Trust, 42 B. T. A. 748.....31, xv
Beers v. Commissioner, 78 F. (2d) 447, cert. denied, 296 U. S. 620 46
Brewster v. Gage, 280 U. S. 327.....13, 54, xi, xii
Brewster v. Gage, 25 F. (2d) 915.....x, xi
Brinton, Lillian McDonald, 28 B. T. A. 472..... 8
Cammann v. Bailey, 210 N. Y. 19.....49, 51
Case v. Los Angeles Lumber Products Co., 308 U. S. 106 47
Chandler v. Field, 63 F. (2d) 13, cert. denied, 289 U. S. 758 46
Clark v. Cammann, 160 N. Y. 315..... 50
Clyde, William P., Jr., 32 B. T. A. 799..... 33
Colgate, Mary, 27 B. T. A. 506, rev'd on other grounds, 69 F. (2d) 809, aff'd, 293 U. S. 144..... 8
Commissioner v. Libbey, 100 F. (2d) 458 .....7, 22
Commissioner v. Maguire, 111 F. (2d) 843....6, 7, 8, 22, 35
Deputy v. Dupont, 308 U. S. 488..... 7
Dimmick v. Patterson, 142 N. Y. 322..... 50
Fairport P. & E. R. Co. v. Meredith, 292 U. S. 589.... 24
Fargo v. Squiers, 6 App. Div. 485, 39 N. Y. Supp. 648, aff'd, 154 N. Y. 250.....49, 50
Fidelity & Columbia Trust Co. v. Commissioner, 90 F. (2d) 219, cert. denied, 302 U. S. 723..... 7
Fleming, Margaret E. B., 36 B. T. A. 773.....8, 22, 24, 33
Forbes v. Commissioner, 82 F. (2d) 204..... 46
Foster, Alice Fisher, 7 B. T. A. 1137..... x

PAGE

Fulton Trust Co. v. Phillips, 218 N. Y. 573..... 50
Gambrill, Richard Van Nest, 38 B. T. A. 981, aff'd, 112 F. (2d) 530.....8, 22
Greenland v. Waddell, 116 N. Y. 234..... 50
Griscom, Rodman E., 22 B. T. A. 979..... 46
Harbison, Ralph W., 26 B. T. A. 896, rev'd on another issue, 68 F. (2d) 1004, aff'd, 293 U. S. 144..... 8
Hartley v. Commissioner, 295 U. S. 216..... 27
Haskell v. Commissioner, 78 F. (2d) 869, aff'g 30 B. T. A. 855, cert. denied, 296 U. S. 652.....7, 33
Hecht v. Malley, 265 U. S. 144..... 47
Helvering v. Gowran, 302 U. S. 238.....27, 28
Helvering v. Hallock, 309 U. S. 106.....42, 43, 44, 45, 48
Helvering v. Northwest Steel Rolling Mills, Inc., U. S. Sup. Ct., Nov. 12, 1940..... 7
Helvering v. R. J. Reynolds Tobacco Co., 306 U. S. 110 47
Helvering v. St. Louis Union Trust Co., 296 U. S. 39.. 43
Helvering v. San Joaquin Fruit & Investment Co., 297 U. S. 496 .....36, 39, 41, 44
Helvering v. Wood, 309 U. S. 344.....7, 11
Hopkins v. Commissioner, 69 F. (2d) 11, cert. denied, 293 U. S. 560 46
Ithaca Trust Co. v. United States, 279 U. S. 151..... 25
Jenkins v. Smith, 21 F. Supp. 433, rev'd on other grounds, 99 F. (2d) 827..... 8
Kalb, Louis, 15 B. T. A. 886..... 46
Kayser, Harry C., 27 B. T. A. 816..... 46
Klein v. United States, 283 U. S. 231..... 43
Lane v. Corwin, 63 F. (2d) 767, cert. denied, 290 U. S. 644 .....7, 46, 49
Lapina v. Williams, 232 U. S. 78 24
Latimer v. United States, 223 U. S. 501..... 47.
Lewisohn v. Henry, 179 N. Y. 352.....49, 50, 51
Lyeth v. Hoey, 305 U. S. 188 26

PAGE

Matter of Inslee, 233 App. Div. 144, 251 N. Y. Supp. 251 50
Matter of McDowell, 178 App. Div. 243, 164 N. Y. Supp. 1024 16
Matter of Robinson, 155 Misc. 855, 280 N. Y. Supp. 687 16
Matter of Schliemann, 259 N. Y. 497 16
Matter of Trevor, 239 N. Y. 6 ..... 50, 51
Matter of Vanderbilt, 172 N. Y. 69 51
Matthiessen, F. W., Jr., 2 B. T. A. 921 ..... ix, x
Matthiessen, F. W., Jr., v. United States, 65 Ct. Cl. 484 ix
McClain v. Commissioner, U. S. Sup. Ct., Jan. 6, 1941 7
McConnell, Stella H., 29 B. T. A. 32 32
McFeely v. Commissioner, 296 U. S. 102 ..... 32, 38, 39, 44
McKinney v. United States, 62 Ct. Cl. 180 ..... 9, 27, ix, x
Molter v. Commissioner, 69 F. (2d) 7 46
Moore v. Littel, 41 N. Y. 66 51
Morgan v. Commissioner, 309 U. S. 78 47
Ogle v. Helvering, 77 F. (2d) 338, rev'd, 296 U. S. 103 39
Pringle v. Commissioner, 64 F. (2d) 863, cert. denied, 290 U. S. 656 46
Reynolds v. Commissioner, 114 F. (2d) 804, No. 684, present Term, cert. granted, Feb. 17, 1941 ..... 22, 30, 48
Richardson v. Smith, D. C. Conn., Sept. 13, 1938, 1938 C. C. H. Federal Tax Service, Vol. 4, par. 9503, rev'd on other grounds, 102 F. (2d) 697 54
Rogers, May, 31 B. T. A. 994, aff'd, 107 F. (2d) 895 .. 32
Roosevelt, George Emlen, 28 B. T. A. 194 22
Smith v. Edwards, 88 N. Y. 92 50
Strathearn S. S. Co. v. Dillon, 252 U. S. 348 24
Taft, Robert A., Trustee, 34 B. T. A. 603, aff'd *per curiam*, 101 F. (2d) 1007 ..... 7, 8
Taft v. Bowers, 278 U. S. 470 32
Twining v. Commissioner 83 F. (2d) 954, cert. denied, 299 U. S. 578 ..... 7, 46

PAGE

United States v. Van Nostrand, 94 F. (2d) 510 7
Van Vranken v. Helvering, 115 F. (2d) 709 .....30, 45, 48
Warner v. Commissioner, 72 F. (2d) 225, cert. denied, 293 U. S. 620, aff'g 28 B. T. A. 1178 .....22, 46
Whiting v. Hudson Trust Co., 234 N. Y. 394 .....40, 41
Williamson, Bessie C., 34 B. T. A. 668, mod'f'd, 34 B. T. A. 924, aff'd, 100 F. (2d) 735, cert. denied, 307 U. S. 623 .....7, 8, 33
Wright, Grace L., 29 B. T. A. 1033..... 46

Statutes:

Internal Revenue Code:
Sec. 811(j) 15, 32, 34
Sec. 812(d) 25
Revenue Act of 1918:
Sec. 202(a) viii
Sec. 202(a)(2) xiv
Revenue Act of 1921:
Sec. 202(a)(2) xiv
Sec. 202(a)(3) viii
Revenue Act of 1924:
Sec. 204(a)(3) xiv
Sec. 204(a)(4) xiv
Sec. 204(a)(5) ix
Revenue Act of 1926:
Sec. 204(a)(2) xv
Sec. 204(a)(3) xv
Sec. 204(a)(4) xv
Sec. 204(a)(5) ix
Sec. 302(c) 43
Revenue Act of 1928:
Sec. 22(b)(3) 26, 28
Sec. 101 .....37, i
Sec. 101(b) i
Sec. 101(c)(2) i

PAGE

Sec. 101(c)(8) ..... 3, 36, 37, 40, 42, 54, i
Sec. 101(c)(8)(A) 53, 54
Sec. 101(c)(8)(B) ..... 37, 38, 53, 54, i
Sec. 101(c)(8)(C) 53, 54
Sec. 101(c)(8)(D) 53, 54
Sec. 113 ..... 37, 54, ii
Sec. 113(a) ..... 19, 23, 26, 28, ii
Sec. 113(a)(2) ..... 31, xv
Sec. 113(a)(3) ..... 31, xv
Sec. 113(a)(4) xv
Sec. 113(a)(5) ..... 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 17, 19, 20, 22, 23, 24, 26, 27, 28, 30, 33, 35, ii, xi, xii
Sec. 701 iii
Sec. 701(a) iii
Sec. 701(a)(1) ..... 14, 37, iii
Sec. 701(a)(13) ..... 14, iii

Revenue Act of 1932:

Sec. 22(b)(3) 26
Sec. 113 ii
Sec. 113(a) ..... 19, 26, 28, ii
Sec. 113(a)(2) ..... 31, xv
Sec. 113(a)(3) ..... 31, xv
Sec. 113(a)(4) xv
Sec. 113(a)(5) ..... 4, 5, 6, 8, 9, 13, 14, 17, 19, 20, 23, 26, 27, 28, 30, 33, 35, ii, xi, xii
Sec. 1111 iii
Sec. 1111(a) iii
Sec. 1111(a)(1) ..... 14, iii
Sec. 1111(a)(14) ..... 14, iii

Revenue Act of 1934:

Sec. 113(a)(2) xv
Sec. 113(a)(5) ..... 22, 46, 48, xii

Judicial Code:

Sec. 240(a) 2

PAGE

Miscellaneous:

16 Abbott New York Digest "Executors and Administrators" 16
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Scott on Trusts 41, 55
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Walsh, Future Estates in New York 51
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Funk & Wagnall's Practical Dictionary 40
Oxford Universal English Dictionary 40
Webster's New International Dictionary 40
G. C. M. 2705, VI-2 Cum. Bull. 174 x
G. C. M. 6195, VIII-1 Cum. Bull. 99 xii
G. C. M. 6811, IX-1 Cum. Bull. 136 xii
G. C. M. 10260, XI-1 Cum. Bull. 79 .....46, xii
G .C. M. 11309, XII-1 Cum. Bull. 126 xii
G. C. M. 14893, XIV-1 Cum. Bull. 202 xii
I. T. 1165, I-1 Cum. Bull. 30 ix
I. T. 1622, II-1 Cum. Bull 135 ix
I. T. 2379, VI-2 Cum. Bull 116 x
I. T. 2539, IX-1 Cum. Bull. 139 xii
I. T. 3340, 1939-2 Cum. Bull. 167 32
O. D. 667, 3 Cum. Bull. 52 viii
O. D. 694, 3 Cum. Bull. 53 viii
O. D. 727, 3 Cum. Bull. 53 .....46, viii
S. M. 3781, IV-2 Cum. Bull. 21 x
S. M. 4640, V-1 Cum. Bull. 60 x
Sol. Op. 35, 3 Cum. Bull 50 viii

PAGE

H. R. Doc. No. 139, 70th Cong., 1st Sess. .....10, iv
H. R. 1, 70th Cong., 1st Sess. 10
H. R. Rep. No. 2, 70th Cong., 1st Sess., 1939-1 Cum. Bull. (Part 2) 384 .....10, iv
H. R. Rep. No. 179, 68th Cong., 1st Sess., 1939-1 Cum. Bull. (Part 2) 241 xv
H. R. Rep. No. 350, 67th Cong., 1st Sess., 1939-1 Cum. Bull. (Part 2) 168 .....ix, xiv
H. R. Rep. No. 704, 73d Cong., 2d Sess., 1939-1 Cum. Bull. (Part 2) 554 xiii
H. R. Rep. No. 1882, 70th Cong., 1st Sess., 1939-1 Cum. Bull. (Part 2) 444 .....12, 18, vi
Sen. Rep. No. 275, 67th Cong., 1st Sess., 1939-1 Cum. Bull. (Part 2) 181 ix
Sen. Rep. No. 558, 73d Cong., 2d Sess., 1939-1 Cum. Bull. (Part 2) 586 xiii
Sen. Rep. No. 960, 70th Cong., 1st Sess., 1939-1 Cum. Bull. (Part 2) 409 .....11, 21, v
Treasury Regulations 33 (revised edition):
Art. 4, par. 41 xiv
par. 44 xiii
Treasury Regulations 45:
Art. 1562 .....viii, xiii, xiv
Treasury Regulations 74:
Art. 596 xiv
Art. 1311 14
Treasury Regulations 77:
Art. 58 .....52, 53, 54, 55, iii
Art. 596 xiv
Treasury Regulations 86:
Art. 113(a)(5)-1 xiii
Art. 113(a)(5)-1(c) xiv
Art. 113(a)(5)-1(d) 28

PAGE

Treasury Regulations 94:
Art. 113(a)(5)-1 xiii
Art. 113(a)(5)-1(c) xiv
Treasury Regulations 101:
Art. 113(a)(5)-1 xiii
Art. 113(a)(5)-1(c) xiv
Treasury Regulations 103:
Sec. 19.113(a)(5)-1 xiii
Sec. 19.113(a)(5)-1(c) xiv

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Petitioner,
v.
SEYMOUR H. KNOX

No. 475

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,
v.
DOROTHY K. G. ROGERS

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

Opinions Below

The opinion of the Board of Tax Appeals (Campbell, No. 473, R. 112) in the *Campbell* case is reported in 39 B. T. A. 916. The Board's opinions in the *Knox* and *Rogers* cases

are memorandum opinions and are unreported (Knox, No. 474, R. 47; Rogers, No. 475, R. 91). The opinion of the Circuit Court of Appeals in all three cases (Campbell, No. 473, R. 133; Knox, No. 474, R. 63; Rogers, No. 475, R. 106) is reported in 112 F. (2d) 530.

Jurisdiction

The judgments of the Court below were entered on July 29, 1940 (Campbell, No. 473, R. 139; Knox, No. 474, R. 69; Rogers, No. 475, R. 113). The petition for a writ of certiorari was filed on September 28, 1940, and was granted on November 12, 1940. The jurisdiction of this Court rests upon Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented

I

As remaindermen of testamentary trusts, the respondents received from the trustees certain securities which had been part of the corpus of the trusts. Some of those securities had been purchased by the decedent and were owned by him at his death; others were purchased by his executors; still others were purchased by the testamentary trustees. What date should be used, under the Revenue Acts of 1928 and 1932, in fixing the basis for determining gain or loss on the sale of these securities by respondents? (This question is common to all three cases.)

II

In the *Knox* case (No. 474) the respondent, a remainderman of a testamentary trust, sold certain securities within two years after they had been received by him from the trustees, but more than two years after the securities had been purchased by the trustees. Were these securities "property

held by the taxpayer for more than two years'' and, therefore, ''capital assets'' within the meaning of Section 101(c)(8), the capital gain and loss provision, of the Revenue Act of 1928?

III

In the *Campbell* case (No. 473) the respondent had purchased certain shares of Woolworth stock prior to the distribution to her as remainderman of a testamentary trust of other shares of Woolworth stock. The latter shares were obtained by the trustees prior to respondent's individual purchases. In applying the ''first in, first out'' rule, which stock must be deemed to have been sold first?

Statutes Involved

The statute involved in the *Campbell* and *Rogers* cases is the Revenue Act of 1932. The statute involved in the *Knox* case is the Revenue Act of 1928. The applicable sections of both Acts appear in Appendix A (*infra*, pp. i-iii).

Statement

The facts are not in dispute. They are set out with substantial accuracy at pp. 8-12 of the Commissioner's *Gambrill* Brief, Nos. 472-475.

The issues were decided in favor of the respondents by unanimous decisions of the Board of Tax Appeals. The Board's decisions were unanimously affirmed by the Circuit Court of Appeals for the Second Circuit in an opinion by Circuit Judge A. N. Hand.

Summary of Argument

I. **With respect to the "basis" issue:**

Respondents' basis for tax purposes in securities distributed to them by the testamentary trustees is to be determined under the provisions of the third sentence of Sec-

tion 113(a)(5) of the Revenue Acts of 1928 and 1932 which provides that "if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer." This is true whether the securities were owned by the decedent at the date of his death or were purchased thereafter by the executors or by the testamentary trustees.

The "taxpayer" referred to in the third sentence of Section 113(a)(5) is the person whose tax liability is under review. The words "time of the distribution to the taxpayer" should be given their plain, ordinary and natural meaning and in these cases should be construed to be the respective dates on which distribution of the securities was made by the trustees to the respondents.

II. With respect to the "period of holding" issue:

Since the loss of the respondent Knox resulted from the sale of securities distributed to him by the testamentary trustees within two years prior to his sale thereof, such securities were not "capital assets" even though the trustees had purchased the securities more than two years prior to such sale. Until the trust property was distributed to him there was no certainty that Mr. Knox or his estate would receive any part of it. Until then he had individually no interest, legal or equitable, in the property constituting the trust corpus. His sole right was a chose in action to enforce the performance of the terms of the trust. This Court has held that "to hold property is to own it," and that to "acquire" property is to obtain it "as one's own." Our contention is that property which is in trust and which the remainderman may never receive cannot be said to be "owned" by the remainderman or to have been obtained as his own and, therefore, cannot be said to have been "held" by him until it was distributed to him free of trust.

III. With respect to the "first in, first out" issue:

Since the "first in, first out" rule is a formula for determining the order in which shares of stock are deemed to have been sold where the particular shares cannot be identified, the order in which the shares become available to the taxpayer for sale should be determinative. In this view the shares purchased by the respondent Campbell individually and with her own funds prior to the distribution to her of like shares by the testamentary trustees should be deemed to be "first in," regardless of the time of acquisition by the trustees of the shares subsequently distributed to the taxpayer.

ARGUMENT

FIRST POINT

The basis for income tax purposes of the securities received by the respondents from the testamentary trustees is the fair market value thereof on the respective dates on which such securities were delivered to the respondents. This is true whether such securities were owned by the decedent at the date of his death or were purchased thereafter by the executors or the testamentary trustees.

A. The construction and legislative history of Section 113 (a) (5) of the Revenue Acts of 1928 and 1932.

The securities involved in these cases were delivered to the respondents by the testamentary trustees in accordance with and on the dates specified in the will of the decedent. The respondent Knox in 1930 sold the securities so delivered to him; the respondents Campbell and Rogers in 1933 sold the securities so delivered to them. The securities delivered to the respondent Knox had been purchased by the testamentary trustees. Some of the securities delivered to the respondents Campbell and Rogers had been owned by

the decedent at the date of his death, others had been purchased by the executors and still others had been purchased by the testamentary trustees.

No real property is involved. None of the securities involved was acquired by specific bequest.

We will discuss first, the statute, the Commissioner's contention with respect to it and its legislative history. Second, we will discuss matters particularly applicable to the basis of securities owned by the decedent at the date of his death, and third, matters particularly applicable to the basis of securities purchased by the executors or trustees. Fourth, we will discuss the assumption made by the Commissioner of the existence of some alleged Congressional plan with respect to the establishment of cost bases. Finally, we will analyze the decision of the Circuit Court of Appeals for the Seventh Circuit in the case of *Commissioner v. Maguire*, 111 F. (2d) 843 (1940), which is to be argued herewith (No. 346, present term), and which is the only authority supporting the Commissioner's position.

I. The statute and its interpretation.

The basis for gain or loss on the sale of the securities involved is controlled by the third sentence of Section 113(a) (5) of the Revenue Acts of 1928 and 1932. The first sentence of this section provides the basis for personal property "acquired by specific bequest" and real property "acquired by general or specific devise or intestacy." The second sentence defines the basis of property sold by a decedent's estate. These sentences are inapplicable. The third sentence is as follows:

> "* * * In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. * * *"

The respondents contend that the phrase, "the time of the distribution to the taxpayer," means precisely what it says, that is, the time when the property was delivered to the taxpayer whose tax is at issue, here the respondents.

The words of the statute are clear and unambiguous. Such a statute must be given effect as written. *McClain v. Commissioner*, U. S. Sup. Ct., Jan. 6, 1941; *Helvering v. Northwest Steel Rolling Mills, Inc.*, U. S. Sup. Ct., Nov. 12, 1940; *Helvering v. Wood*, 309 U. S. 344 (1940); *Deputy v. Dupont*, 308 U. S. 488 (1940).

The Court below so held, saying:

> "The words 'the property' in the foregoing sentence seem inevitably to relate to the particular property sold by the taxpayer to whom it was distributed by the trustee. The term 'taxpayer' is defined by Section 701(a) (13) of the Revenue Acts of 1928 and 1932 as 'any person subject to a tax imposed by this Act.' It is hard to imagine language which would more clearly fix the basis for computing the gain or loss realized upon the sales of the securities with which the Commissioner had to deal than the words 'fair market value of the property at the time of the distribution to the taxpayer.'"

(Campbell, No. 473, R. 136; Knox, No. 474, R. 66; Rogers, No. 475, R. 109.)

The Court decisions on the point except for the *Maguire* case, *supra*, support the respondents' contention.[1]

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[1] Commissioner v. Libbey, 100 F. (2d) 458 (C. C. A. 1st, 1938); United States v. Van Nostrand, 94 F. (2d) 510 (C. C. A. 1st, 1938). See also Haskell v. Commissioner, 78 F. (2d) 869 (C. C. A. 3d, 1935), cert. denied, 296 U. S. 652 (1935); Williamson v. Commissioner, 100 F. (2d) 735 (C. C. A. 6th, 1938), cert. denied, 307 U. S. 623 (1939); Commissioner v. Taft, 101 F. (2d) 1007 (C. C. A. 6th, 1939).

Cf. Lane v. Corwin, 63 F. (2d) 767 (C. C. A. 2d, 1933), cert. denied, 290 U. S. 644 (1933); Twining v. Commissioner, 83 F. (2d) 954 (C. C. A. 2d, 1936), cert. denied, 299 U. S. 578 (1936); Becker v. Anchor Realty & Investment Co., 71 F. (2d) 355 (C. C. A. 8th, 1934); Fidelity & Columbia Trust Co. v. Commissioner, 90 F. (2d) 219 (C. C. A. 6th, 1937), cert. denied, 302 U. S. 723 (1937).

The Board of Tax Appeals in a long line of decisions under the 1928 and 1932 Acts has consistently reached the same result.[2]

The opinion of the leading writer on income taxation is identical with respondents' contention. 2 Paul & Mertens *The Law of Federal Income Taxation* (1934) §18.88, pp. 346-348; Paul & Mertens (Mertens Supp. 1939) §18.88, p. 809.

The decision in the *Maguire* case rests upon an interpretation of the legislative history of Section 113(a) (5) of the Revenue Act of 1928 which is fragmentary and incorrect. (See *infra*, pp. 9-13, 35-36; *cf. Appendix B*, pp. viii-xv).

The opinion in *Jenkins v. Smith*, 21 F. Supp. 433 (D. Conn. 1937), rev'd on other grounds, 99 F. (2d) 827 (C. C. A. 2d, 1938), relied upon by the Commissioner (Commissioner's *Maguire* Brief, No. 346, p. 26), is dictum as to this issue and has been impliedly overruled by the Second Circuit Court of Appeals in these cases.

II. The Commissioner's contention.

The Commissioner contends that the clear and exact language of Section 113(a) (5) must be narrowed. He maintains that as to securities owned by the decedent or purchased by the executors, the basis is the value of the securities at the time of the delivery to the testamentary trus-

[2] Ralph W. Harbison, 26 B. T. A. 896 (1932), rev'd on another issue, 68 F. (2d) 1004 (C. C. A. 2d, 1934), aff'd, 293 U. S. 144 (1934); Mary Colgate, 27 B. T. A. 506 (1932), rev'd on other grounds, 69 F. (2d) 809 (C. C. A. 2d, 1934), aff'd, 293 U. S. 144 (1934); Lillian McDonald Brinton, 28 B. T. A. 472 (1933); Margaret E. B. Fleming, 36 B. T. A. 773 (1937); Richard Van Nest Gambrill, 38 B. T. A. 981 (1938), aff'd, 112 F. (2d) 530 (C. C. A. 2d, 1940), No. 472, present Term (to be argued herewith). See also James W. Arrott, Jr., 34 B. T. A. 133 (1936); Robert A. Taft, Trustee, 34 B. T. A. 603 (1936), aff'd per curiam, 101 F. (2d) 1007 (C. C. A. 6th, 1939); Bessie C. Williamson, 34 B. T. A. 668 (1936), mod'f'd, 34 B. T. A. 924 (1936), aff'd, 100 F. (2d) 735 (C. C. A. 6th, 1938), cert. denied, 307 U. S. 623 (1939).

tees; as to securities purchased by the trustees, the basis is their cost to the trustees. His argument is elaborate but, simply stated, reduces to less than a syllogism:

1. Congress throughout the Revenue Acts has followed a general plan of fixing the basis for property acquired by inheritance at the date of the decedent's death.

2. Therefore, Section 113(a) (5) of the Revenue Acts of 1928 and 1932 must be limited to provide a basis nearest in time to date of death.

All other arguments of the Commissioner are subordinate to this.

The answers are complete and equally simple:

1. The provisions of Section 113(a) (5) are expressly contrary to the Commissioner's conclusion.

2. No such general Congressional plan of date-of-death basis ever existed.

The fallacy in both the Commissioner's major premise of a general Congressional plan and his conclusion on the narrow interpretation of the 1928 Act is most clearly shown in the immediate history of the enactment of the Revenue Act of 1928.

III. The History and Development of Section 113(a) (5) of the Revenue Act of 1928.

The 1926 and prior Revenue Acts had provided that the basis for property acquired by inheritance was the value at the date of acquisition. The phrase "date of acquisition" had been construed in a variety of ways by the Board of Tax Appeals, the Courts and the Bureau of Internal Revenue. In particular, the case of *McKinney v. United States*, 62 Ct. Cl. 180 (1926), in which the Court of Claims held that the basis for securities sold by an executor was the decedent's basis, had added greatly to the confusion.

For the information of the Court we have set forth in Appendix B a chronological history of the Revenue Acts in so far as they relate to the basis of property acquired by inheritance and gift.

In 1927 the Joint Committee on Internal Revenue Taxation made a report which recommended that in the interest of certainty the statute be changed to adopt as the basis the value of the property at the date of the decedent's death. H. R. Doc. No. 139, 70th Cong., 1st Sess. (1927) 17. The report stated as its reasons for the recommendation in part as follows:

> "Section 204(a) (5) prescribes the basis when the beneficiary sells the property as the value at the time of 'acquisition.' Some doubt has arisen as to what is meant by the date of acquisition. The 'date of death' is recommended to make the basis certain and definite."

In accordance with this report, Section 113(a) (5) of the Revenue Act of 1928 was introduced in the House in the following form (H. R. 1, 70th Cong., 1st Sess.):

> "(5) Property Transmitted at Death.—If the property was acquired by bequest, devise, or inheritance, or by a decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of the death of the decedent."

The report of the Ways and Means Committee accompanying this bill explained the change as follows (H. R. Rep. No. 2, 70th Cong., 1st Sess. (1927) 18, 1939-1 Cum. Bull. (Part 2) 384, 396):

> "Sec. 113. Basis for Determining Gain or Loss.—Executor's Sale.
>
> "In view of the decision of the Court of Claims in McKinney v. United States, it is desirable specifically to provide what basis shall be used in determining gain or loss on the sale of property by an estate. It is believed that the basis should be the value of the property on the date of the decedent's death, and this rule is incorporated in section 113(a) (5).

"It is also provided, in the same paragraph, that the basis in case of a sale by a beneficiary shall be the value of the property on the date of the decedent's death.

"Under existing law, the basis in such a case is the value at the date of 'acquisition,' which is indefinite and has given rise to controversy. The value on the date of death affords an equitable and more readily determinable basis."

If the House bill had been enacted in 1928 there would be support for the Commissioner's contention that a Congressional plan existed of fixing the basis for property acquired by inheritance at the date of decedent's death. But the House bill was not enacted by Congress and has never been enacted. *Cf. Helvering v. Wood,* 309 U. S. 344 (1940). Section 113(a) (5) as reported to the Senate by the Senate Finance Committee was in entirely different form. As so introduced the bill read:

"If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer;"

The Senate Committee report explains the reasons for this change at length. Sen. Rep. No. 960, 70th Cong., 1st Sess. (1928) 26, 27, 1939-1 Cum. Bull. (Part 2) 409, 427. After reviewing the reasons for the change made by the House bill, the report to the Senate continues:

"It appears that the House bill is inadequate to take care of a number of situations which frequently arise. For example, the executor, pursuant to the terms of the

will, may purchase property and distribute it to the beneficiaries, in which case it is impossible to use the value at the decedent's death as the basis for determining subsequent gain or loss, for the decedent never owned the property. Moreover, the fair market value of the property at the decedent's death can not properly be used as the basis, in the case of property transferred in contemplation of death where the donee sells the property while the donor is living.

"Accordingly, the committee has revised section 113(a) (5) and certain related sections, so as to provide that in the case of a specific bequest of personalty, or a general or specific devise of realty, or the transmission of realty by intestacy, the basis shall be the fair market value at the time of the death of the decedent. * * * In all other cases the basis is the fair market value of the property at the time of the distribution to the taxpayer. The latter rule would obtain, for example, in the case of personal property not transmitted to the beneficiary by specific bequest, but by general bequest or by intestacy. It would also apply in cases where the executor purchases property and distributes it to the beneficiary."

The Senate Committee report is set forth in full in Appendix A, pp. v-vi.

Section 113(a) (5) was passed by the Senate in the form reported by the Senate Committee and in the Conference Committee the House receded, adding only an amendment making the section applicable to revocable *inter vivos* trusts. The report of the Conference Committee repeated the above quoted part of the Senate Finance Committee report as the explanation of the Conference Committee's action. H. R. Rep. No. 1882, 70th Cong., 1st Sess. (1928) 3, 14, 1939-1 Cum. Bull. (Part 2) 444, 447.

Clearly the immediate purpose of Congress in enacting Section 113(a) (5) of the Revenue Act of 1928 was to substitute certainty for the confusion which then existed. For real estate and specific bequests, the date of death,

an easily ascertainable event, was chosen as the basis-establishing date. In all other cases, the time of distribution to the taxpayer, another event usually definite of ascertainment, was chosen as the time as of which value should establish basis.

Equally clearly, Section 113(a) (5) of the 1928 Act was a complete change from the corresponding sections of prior Acts. In *Brewster v. Gage*, 280 U. S. 327 (1930) this Court so held, stating at p. 337:

> "The Revenue Act of 1928, §113 (a) (5), expressly established value at the time of the death of the decedent as the basis of calculation in respect of sales of personal property acquired by specific bequest and of real estate acquired by general or specific devise or by intestacy, and in all other cases fixed fair market value at the time of distribution to the taxpayer as the basis. 45 Stat. 819. The deliberate selection of language so differing from that used in the earlier acts indicates that a change of law was intended."

B. The basis of securities owned by the decedent at the date of his death and distributed to respondents by the testamentary trustees.

I. The clear language of Section 113(a) (5) of the Revenue Acts of 1928 and 1932 requires that this basis shall be the fair market value of the securities at the time of their delivery by the trustees to the respondents.

1. The Commissioner concedes that the third sentence of Section 113(a) (5) of the 1928 and 1932 Acts is controlling in the determination of the basis of the securities owned by this decedent at the date of his death. This sentence fixes the basis "at the time of the distribution to the taxpayer."

The Commissioner contends, however, that this phrase should be construed as meaning the time of the delivery from the executors to the trustees.

Apparently the parties are in agreement that the word "distribution" in Section 113(a) (5) means delivery. Thus the Commissioner is contending for the time of delivery by the executors to the trustees, the respondents for the time of delivery from the trustees to the beneficiaries. The dispute narrows itself to the question of what is meant by the word "taxpayer."

2. Section 701 (a) (13) of the 1928 Act and Section 1111(a) (14) of the 1932 Act define the word "taxpayer" as follows:

> "The term 'taxpayer' means any person subject to a tax imposed by this Act."

The word "person" is defined in subsection (a) (1) of the same sections as:

> "The term 'person' means an individual, a trust or estate, a partnership, or a corporation."

Regulations 74, Article 1311, under the Act of 1928 interprets these sections as follows:

> "Art. 1311. Persons.—The Act recognizes four classes of persons—individuals, trusts and estates, partnerships, and corporations. * * * A taxpayer is any person subject to a tax imposed by the Act."

In the face of these precise statutory definitions it is entirely clear that the word "taxpayer" in Section 113 (a) (5) means the person whose tax is in issue, and not some entirely different person, an estate or trust.

The separateness of trust and beneficiary for tax purposes has been expressly recognized by this Court. In *Anderson v. Wilson,* 289 U. S. 20 (1933) the Court, speaking through Mr. Justice Cardozo, said at p. 27:

> "* * * we do not forget that the trust is an abstraction, and that the economic pinch is felt by men of flesh and blood. Even so, the law has seen fit to deal with this abstraction for income tax purposes as a separate existence, making its own return under the hand of the fiduciary and claiming and receiving its own appropriate deductions. * * *"

The argument of the Commissioner here will be recognized as essentially the unsuccessful argument of the taxpayer in *Anderson v. Wilson, supra.*

Where the trustee sells the securities he is the taxpayer as defined in the statute and his basis is the value at the time of delivery to him. Under the statutory plan there is no more anomaly in the beneficiary and the trustee having different bases on the sale of property than there is in John Smith and Henry Jones having different bases. *Cf.* Commissioner's *Maguire* Brief, No. 346, p. 28.

Under the careful and exact language of the Revenue Act, therefore, the phrase "the time of the distribution to the taxpayer", in cases where the basis of securities sold by a beneficiary is at issue, can only mean at the time of the delivery of the securities to the beneficiary.

II. In answer to the Commissioner's contentions.

1. The Commissioner's contention is that the phrase "time of the distribution to the taxpayer" should be construed as if it read "time of the distribution by the executors to the trustees."[3]

2. The Commissioner's contention loses sight of the expressed purpose of Congress in enacting Section 113 (a) (5) of the Revenue Act of 1928 to end the confusion which had resulted from the previous statutory provision. A basis determined as of the time of the delivery by exec-

[3] It is perhaps significant that when the Commissioner states his construction of the statutory words "time of the distribution to the taxpayer", he uses the paraphrase "distributed by the executors." (Commissioner's Maguire Brief, No. 346, e. g., p. 16.) If Congress had meant that its language should be so construed it might easily have written Section 113(a) (5) in those words. Elsewhere in the Revenue Acts, Congress has demonstrated its capacity to write the phrase "distributed by the executors" when that is what it means. Cf. Section 811(j) of the Internal Revenue Code (the optional valuation section of the estate tax) in which Congress provided that property "distributed by the executor" within one year after the decedent's death shall be included in the gross estate "at its value as of the time of such distribution."

utors to trustees yields only utter confusion. The following is illustrative:

In common forms of wills the testator may simply appoint an executor but in his dispositive provisions impose trust duties on the executor; he may appoint only an executor but expressly create a trust; or he may appoint a single fiduciary, call the fiduciary an "executor and trustee" and make no distinction between the powers and duties in the two capacities. Assume a gift of personalty under such wills, not a specific bequest. If a remainderman under any of these wills sells property, how does the Commissioner's basis of value at the date of delivery to the trustee apply? Under the first two types of wills in form and in fact there is but one fiduciary and in practice there will be no distinction between the fiduciary's two capacities. Under all three types of wills the fiduciary will never be required to transfer property to himself as trustee since the property may be and frequently is registered in his dual capacity. How is the date of the basis for which the Commissioner contends to be determined? Will it be the date on which the last debt is paid? Will it be the date beyond which local statutes permit distribution by the executor without recourse by unknown creditors? Will it be a date arbitrarily fixed after such a time has passed that the taxing authorities may say the fiduciary is necessarily holding as trustee? Or, on the other hand, will not the time of the distribution be the time when the property is delivered to the beneficiaries?[4]

[4] This same problem exists under New York law in determining whether a fiduciary who acts as both executor and trustee is entitled to double commissions. The difficulties in the problem are sharply emphasized by the volume of litigation of the question in New York. The New York digest lists 93 decisions on the point. 16 Abbott New York Digest (1929) "Executors and Administrators" §495(2); 16 Abbott (1940 Cum. Annual Pocket Part) 190-194. See, e. g., Matter of Schliemann, 259 N. Y. 497 (1932). For other examples of the difficulties, see, Matter of McDowell, 178 App. Div. 243, 164 N. Y. Supp. 1024 (3d Dept. 1917); Matter of Robinson, 155 Misc. 855, 280 N. Y. Supp. 687 (Surr. Ct., 1935).

It is apparent that a basis of value at the date of the delivery by the executors to the trustees, as contended for by the Commissioner, could be applied with certainty only in those cases where there is a clear separation of identity of executors and trustees. The certainty sought for by Congress would therefore depend entirely upon the form of appointment employed in the particular will and the identity of the appointees. On the other hand, if, as the respondent taxpayers believe, the date of distribution to the beneficiaries is the basis-establishing time, certainty is promoted, since that event is necessarily clearly marked in almost every instance by a manual tradition, an actual handing over, of property from one person to another.

Necessarily the problem here outlined is present in those cases where property is sold by a testamentary trustee.[5] But, to say that Congress intended to enact the basis for which the Commissioner contends in every case, including that of a sale by a remainderman, is to say that it has enacted a basis which is impossible of general application while announcing that it is substituting certainty for confusion. Such a conclusion amounts to imputing to Congress an inability to provide the means to reach its clearly expressed end; and this conclusion can be attained only by the dubious process of reading away the clear language of the statute.

3. Not only does the Commissioner's proposed basis lead to uncertainty, its renders Section 113 (a) (5) inherently contradictory.

In the course of the enactment of Section 113 (a) (5) of the 1928 Act the House added to the section, while the bill was before the Conference Committee, a fourth sentence which provides as follows:

[5] In addition, where the fiduciary sells there is necessarily present the further problem of determining whether the sale is made in the capacity of executor or the capacity of trustee.

> "In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death."

H. R. Rep. No. 1882, 70th Cong., 1st Sess. (1928) 3. The Conference report describes the scope of this provision as follows:

> "This rule includes sales or other dispositions by the trustee and also by a beneficiary of the trust."

H. R. Rep. No. 1882, 70th Cong., 1st Sess. (1928) 15, 1939-1 Cum. Bull. (Part 2) 444, 447. Under this provision, therefore, an *inter vivos* revocable trust is to be treated as a testamentary trust.

Assume the attempt to apply the Commissioner's basis to personal property, not a specific bequest, passing under such a revocable trust. The basis of distribution from executor to trustee is impossible of such application; there is only one fiduciary. The date of death can not be the basis since the gift was not a specific bequest. Only the date of delivery to the beneficiary can be used as the basis in this situation. The argument advanced by the Commissioner would give the remainderman of a testamentary trust a different basis than the remainderman of a revocable *inter vivos* trust when it was the obvious intention of Congress that they should stand in the same position.

It might be added in passing that the statement in the Conference report on the 1928 Act last quoted shows that Congress was aware of the problem of sales by the beneficiary of a trust and was not merely concerned with the problem of sales by the beneficiary of an estate. (*Cf.* Commissioner's *Maguire* Brief, No. 346, p. 23.)

C. The basis of securities purchased by the executors or testamentary trustees and distributed to respondents by the trustees.

I. The basis of such securities is controlled by Section 113(a) (5) of the Revenue Acts of 1928 and 1932 and is the fair market value thereof at the time of their distribution by the trustees to the respondents.

1. As to securities purchased by the testamentary trustees and delivered to the respondents, the Commissioner contends that Section 113(a) (5) does not apply and that the basis is the cost to the trustee.

The third sentence of Section 113(a) (5) of the 1928 and 1932 Acts is as follows:

> "* * * In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. * * *"

The Commissioner's argument is that securities purchased by a trustee and delivered to the taxpayer are not "acquired by will" by the taxpayer and hence that this provision is not applicable. He then argues that the primary Section of 113(a) applies and requires the use of the trustee's cost.

The Commissioner concedes that the Committee reports on the 1928 Act require him to use some basis other than cost to the fiduciary in the case of securities purchased by executors (Commissioner's *Maguire* Brief, No. 346, p. 29; Commissioner's *Gambrill* Brief, Nos. 472-475, p. 20). This represents a change of position by the Commissioner. In the Court below he took the position that the basis for securities, whether purchased by the executors or trustees, was the cost to the purchasing fiduciary (Campbell, No. 473, R. 36, 69, 114, 137; Rogers, No. 474, R. 32, 93, 110).

2. The Court below in its decision in these cases held that all such property was acquired by will and hence that

the third sentence of Section 113(a) (5) of the 1928 and 1932 Acts applied to securities so purchased. In so deciding, it said:

> "* * * Any property distributed by a trustee which is part of the corpus of the trust is acquired through and by virtue of the will. Through the will the remaindermen derived all their interests and without it they would have had no standing and would have received nothing. Lyeth v. Hoey, 305 U. S. 188, 194-195."

(Campbell, No. 473, R. 137; Knox, No. 474, R. 67; Rogers, No. 475, R. 111.)

3. The ordinary meaning of the term "acquired by will" is the receipt of any property, in whatever form, which has its origin in the testator's estate. Suppose the ordinary pecuniary legacy of $5,000 to *A*. As a practical matter in most estates and theoretically in all estates the executor will be forced to sell property, receive cash and pay the legacy in cash. Only by accidental circumstances will there be enough cash to pay debts, taxes and legacies. The cash paid to *A* is not part of the original inheritance but it will hardly be denied that the cash received under this type of legacy is acquired by will.

4. Moreover, in a strictly legal sense, property purchased by executors or trustees and delivered to beneficiaries under a will is acquired by those beneficiaries "by will." The instrument of conveyance under which legal title to the property passes from the fiduciary to the beneficiary is the will. It is not and can not be any other document. All the beneficiary's interests, his "bundle of rights", stem from the will.

5. The Congressional Committee reports expressly indicate that Congress intended to include within the phrase "acquired by will" property purchased by a fiduciary. The Senate Finance Committee report gives the reason

for the change from the House bill which had provided a basis of value at the date of death as follows:

> "It appears that the House bill is inadequate to take care of *a number* of situations which frequently arise. *For example*, the executor pursuant to the terms of the will, may purchase property and distribute it to the beneficiaries, in which case it is impossible to use the value at the decedent's death as the basis for determining subsequent gain or loss, for the decedent never owned the property. * * *
>
> "Accordingly, the Committee has revised section 113(a) (5) and certain related sections, so as to provide that in the case of a specific bequest of personalty or a general or specific devise of realty, or the transmission of realty by intestacy, the basis shall be the fair market value at the time of the death of the decedent. * * * In all other cases the basis is the fair market value of the property at the time of the distribution to the taxpayer. The latter rule would obtain, *for example,* in the case of personal property not transmitted to the beneficiary by specific bequest, but by general bequest or by intestacy. It would *also* apply in cases where the executor purchases property and distributes it to the beneficiary." (Italics ours.)

Sen. Rep. No. 960, 70th Cong., 1st Sess. (1928) 26, 1939-1 Cum. Bull. (Part 2) 409, 427.

The full text of the report appears in Appendix A (pp. v-vi).

It is apparent that Congress intended to cover those cases of property acquired by will as to which the House bill was inadequate. If the House bill was inadequate to cover interim purchases by an executor, it was as clearly inadequate with reference to interim purchases by a trustee. The reference to property purchased by executors is simply an illustration following the words "for example" and indicates that this is not the sole situation which the change was designed to meet. The all inclusiveness of the statute as enacted is likewise shown by the statutory

provision that "*In all other cases*" the basis is value at the time of distribution to the taxpayer. It must be clear that the statutory language is as appropriate to control cases of purchase by a trustee as it is to provide a basis for property purchased by an executor.

There is no warrant, from anything which appears either in the statute or in the Committee reports, which justifies limiting the third sentence of Section 113(a) (5) to property purchased by executors.

6. The Courts have assumed, without question, with the single exception of the *Maguire* case, that Section 113(a) (5) of the 1928 Act, or corresponding sections of prior Acts, is determinative of the basis.[6]

The Board of Tax Appeals in a series of decisions has uniformly held that Section 113(a) (5) is controlling as to securities purchased by a testamentary trustee.[7] The recent decision of the Fourth Circuit Court of Appeals in *Reynolds v. Commissioner*, 114 F. (2d) 804 (1940), No. 684, present Term, cert. granted, Feb. 17, 1941, is a square holding that the basis of securities purchased by a testamentary trustee was determined under Section 113(a) (5), in that case, of the 1934 Act.

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[6] Warner v. Commissioner, 72 F. (2d) 225 (C. C. A. 2d, 1934), cert. denied, 293 U. S. 620 (1934), aff'g, 28 B. T. A. 1178 (1933); Commissioner v. Libbey, 100 F. (2d) 458 (C. C. A. 1st, 1938).

[7] George Emlen Roosevelt, 28 B. T. A. 194 (1933); Margaret E. B. Fleming, 36 B. T. A. 773 (1937); Richard Van Nest Gambrill, 38 B. T. A. 981 (1938), aff'd, 112 F. (2d) 530 (C. C. A. 2d, 1940), No. 472, present Term (to be argued herewith).

Text writers are of the same opinion. See 2 Paul & Mertens, The Law of Federal Income Taxation (1934) p. 348, n. 79. The authors there state:

"It is suggested that the Committees' reports expressly show that the third sentence of §113(a) (5) of the 1928 Act was intended to apply to cases in which property is purchased by an executor and distributed to the legatees.

"A similar rule would naturally obtain where the purchase was made by a testamentary trustee, once it has been conceded that distribution to the trustee is not a distribution to the beneficiary."

II. In Answer to the Commissioner's Contentions

1. The Commissioner's assumption that Section 113(a)(5) is inapplicable to securities purchased by the trustees is unsound for the reasons already stated.

2. The Commissioner, however, seeks to take refuge in an attempted distinction between executors and trustees. In the Court below he contended that purchases by each should be treated in the same manner for basis purposes, *i. e.*, that the remainderman should have as his basis the cost to the purchasing fiduciary. He admits that logic requires the same position here. The Senate Finance and Conference Committee reports on the 1928 Act, however, force him to concede that purchases by executors must be taken to be acquired by will within Section 113(a)(5) (Commissioner's *Maguire* Brief, No. 346, p. 29; Commissioner's *Gambrill Brief*, Nos. 472-475, p. 20).

(a) The Commissioner seeks to make his distinction, first, on the argument that the title of Section 113(a)(5) limits the application of the section (Commissioner's *Maguire* Brief, No. 346, pp. 29, 30). That title is "Property Transmitted at Death." The fact is that the history of this title completely destroys the significance which the Commissioner would attach to it. Prior to the enactment of the 1928 Act the subsections of the sections of prior Acts corresponding to Section 113(a) had had no titles. In the 1928 Act the sections were renumbered and the subsections of Section 113(a) given titles. As has been stated, the 1928 Act as first introduced in the House provided a single basis, *i. e.*, the "value of such property at the time of the death of the decedent." The title of Section 113(a)(5) of the House bill was "Property Transmitted at Death." It was, therefore, exactly consistent with the subsection. It is clear that the Senate bill completely changed the substance of the House bill and it is the Senate bill which re-

mained the form of the 1928 Act as finally enacted. The title to Section 113(a)(5) in the House bill was simply carried over to the Senate bill along with all other titles in the House bill. Since the Senate bill is a complete change from the House bill, a title drafted to describe Section 113(a)(5) of the House bill has no significance in interpreting the bill as finally enacted in the changed Senate form. In addition, it is clear that the title of a statute must yield to the "plain meaning of its text." *Strathearn S. S. Co. v. Dillon*, 252 U. S. 348, 354 (1920); *Lapina v. Williams*, 232 U. S. 78, 92 (1914); *Fairport P. & E. R. Co. v. Meredith*, 292 U. S. 589, 594 (1934).

(b) As the second step toward making his purported distinction between purchases by an executor and purchases by a trustee, the Commissioner elaborates unquestioned differences between an executor and a trustee. (Commissioner's *Maguire* Brief, No. 346, pp. 30, 31.) These differences have no relevancy whatever in determining whether certain property is acquired by will.

The Commissioner uses them in turn as a springboard for arguing that during the estate administration the "basic testamentary disposition is in suspense," that the subsequent trust administration is not testamentary in nature. (Commissioner's *Maguire* Brief, No. 346, pp. 30-32.) This argument conceals two assumptions: one, that the time of holding by a fiduciary is material in determining whether property is acquired by will, and two, that a testamentary trustee acts for the beneficiary and not at the direction of the decedent.

Since the question at issue is *how* the property is acquired, *i. e.*, whether it is acquired by will, the time *when* the property is acquired is immaterial. See *Margaret E. B. Fleming*, 36 B. T. A. 773, 777 (1937). Similarly it is elementary in trust law that the powers and duties of a

testamentary trustee are dependent solely upon the terms of the will. He may purchase property only if, and of the kind, permitted by the will. He does not act for the beneficiary, but as a fiduciary carrying out the wishes of the testator as expressed in the will. His actions, as do an executor's, spring from "basic testamentary dispositions."

(c) Like the Commissioner's proposed basis of value at the time of delivery by the executors, his attempted distinction between the basis of property purchased by executors and that of property purchased by trustees, in practice is impossible of general application. Where the executor and trustee are the same person, the difficulty in many instances in determining whether the purchase was made by the executor or by the trustee is apparent.

3. The Commissioner argues generally for his position that property purchased by trustees is not acquired by will, by offering as analogies the sections on property acquired by gift and the sections in the 1926 and prior Acts and 1934 and subsequent Acts on property acquired by inheritance (Commissioner's *Maguire* Brief, No. 346, pp. 32-36). As we will later point out, these analogies are patently faulty. See *infra*, pp. 29-32. A better analogy is found in the provision under the estate tax, now Internal Revenue Code § 812(d), that a deduction will be allowed in "the amount of all bequests, legacies, devises or transfers" for charitable purposes. It is unquestioned that any property transferred to a remainderman-charity by a testamentary trustee in accordance with the provisions of the will, however the property is acquired by the trustee, is a "bequest, legacy or devise" within this provision. See, *e. g., Ithaca Trust Co. v. United States*, 279 U. S. 151 (1929).

Similarly, there is no question but that none of the property passing through a testamentary trust, however acquired, is taxable income to the trust remainderman under

Section 22(b)(3) of the Revenue Act of 1928 and corresponding sections of the other Revenue Acts which exclude from gross income "property acquired by * * * bequest, devise or inheritance."

Indeed, the Commissioner, in his *Maguire* Brief, No. 346, at pp. 6, 11 and 15, has by inference stated his understanding that the facts in the instant cases are within the provisions of Section 22(b) (3) of the 1928 and 1932 Acts, and, hence, that all of the securities delivered to the respondents, including those purchased by the trustees, were acquired by the respondents "by * * * bequest, devise or inheritance." Coupled with his express statement that the phrases "acquired by will" and "acquired by bequest, devise or inheritance" are synonymous (Commissioner's *Maguire* Brief, No. 346, p. 33), this amounts to an unavoidable admission by the Commissioner that property distributed by a testamentary trustee to a remainderman, however acquired by the trustee, is acquired by the remainderman "by will."

Such a result is implicit in the holding of this Court in *Lyeth v. Hoey*, 305 U. S. 188 (1938), with respect to Section 22(b) (3) of the 1934 Act, where the Court stated (at p. 194):

> "In exempting from income tax the value of property acquired by 'bequest, devise, or inheritance,' Congress used comprehensive terms, embracing all acquisitions in the devolution of a decedent's estate."

4. Corollary to his argument that Section 113(a)(5) is inapplicable to securities purchased by trustees, the Commissioner contends that the basis of such securities when sold by the remainderman is the trustees' cost. He assumes that this result follows under Section 113(a) of the statute (Commissioner's *Maguire* Brief, No. 346, pp. 36-37).

Significantly, aside from the *Maguire* case, the only decision in which the view has been entertained that another

taxpayer's cost may be used without statutory authority is *McKinney v. United States*, 62 Ct. Cl. 180 (1926). In that case executors sold property which had been purchased by the decedent. The Revenue Act of 1918 was controlling and since there was no provision in that Act comparable to Section 113(a)(5), the Court of Claims was obliged to determine the taxable gain, if any, upon a basis of "cost." Because the executors had not bought the property and, therefore, had no cost, the Court felt obliged to use the decedent's basis.

In *Hartley v. Commissioner*, 295 U. S. 216 (1935) the *McKinney* case was specifically disapproved by this Court. After pointing out that an administrator or executor is a separate taxpayer, this Court completely rejected the theory upon which the *McKinney* case was decided.[8]

Moreover, as we have already pointed out, the *McKinney* decision was so clearly contrary to Congressional intent that the amendments written into Section 113(a)(5) of the Revenue Act of 1928 were the almost direct result.

In *Helvering v. Gowran*, 302 U. S. 238 (1937), this Court, referring to the basis of stock dividends, said at p. 244:

> "Gain on them is, therefore, to be computed as provided in sections 111 and 113 * * * by the 'excess of

[8] It is worth noting the parallel between the Commissioner's argument at pp. 17, 18 of his Maguire brief, No. 346, and the reasoning adopted by the Court of Claims in the McKinney case. Here the Commissioner argues that since admittedly the basis of property sold by testamentary trustees is the value thereof when distributed to them by the executors, there should be no shifting of basis merely because the trustees distribute the property to the remainderman. In the McKinney case the court reasoned that since "the stock was the same stock as it had been in the hands of the decedent, and * * had he lived and sold the stock himself there would have been no question of taxable gain", the fact that the stock was sold by the executors "did not alter the situation". The parallel is interesting because it illustrates in a forceful way how inevitably the Commissioner's construction reverts to the precise position repudiated by this Court in the Hartley case and from which Congress thought it had escaped by enacting Section 113(a) (5) of the Revenue Act of 1928.

the amount realized' over 'the cost of such property' *to the taxpayer.*" (Italics ours.)[9]

Since the respondents and not the trustees are the taxpayers, they may not under Section 113(a) take the trustees' cost as their basis in securities distributed to them from the trust. The respondents' cost would be zero. *Helvering v. Gowran, supra.* This cannot be their basis, since the result would be to tax their entire inheritance, contrary to the express statutory exemption. Revenue Act of 1928, Section 22(b)(3). If Section 113(a)(5) is not applicable, as the Commissioner contends, then no section of the Act is applicable. The inevitable and only reasonable conclusion is that Section 113(a)(5), couched as it is in broad language to cover "all other cases" and specifically designed to take care of the "number of situations" which the date of death rule was inadequate to cover, is applicable.

5. The Commissioner's argument that Article 113(a)(5)-1(d) of Treasury Regulations 86 "represents the correct interpretation of earlier as well as later Acts" (Commissioner's *Maguire* Brief, No. 346, p. 37) is unfounded. Those Regulations were promulgated for the first time under the Revenue Act of 1934. They had no counterpart in the Regulations under the 1928, 1932 or prior Acts. Those Regulations weaken, rather than strengthen, the Commissioner's case. It is significant that this Regulation was issued as an interpretation of Section 113(a)(5) of the Act and not Section 113(a).

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[9] Illustrative of the general acceptance of this view, see Roswell Magill, "Taxable Income" (1936), p. 99, where the author says: "In general, of course, it (the amount of the gain) is the difference between the cost to the taxpayer of the asset sold, and the sale price."

D. With respect to the Commissioner's basic assumption that there is a uniform Congressional scheme which requires a basis of value as of the date of death in the case of property acquired by inheritance.

1. Used as the introduction to the summary of his argument (Commissioner's *Maguire* Brief, No. 346, p. 6) and frequently reappearing in the Commissoner's *Maguire* Brief, No. 346, (pp. 7-8, 15-16, 20, 36) is a basic assumption, upon which most of his arguments are builded. In the summary (p. 6) the Court is told "The historical development of the statutory provisions dealing with the basis for property acquired by gift or inheritance reveals a general plan to leave the value of such property, as of the date of gift or of the decedent's death, free from income tax in the beneficiary's hands, and to use that value as the beneficiary's basis for determining gain or loss on a subsequent disposition." On pages 15-16, the reference is to a theory or scheme against time gaps "during which fluctuations in value of property are immunized from tax effect."

These words have a facile sound. Actually they are a deceptive over-simplification, which, if stated by other counsel, would suggest only a fragmentary familiarity with the Revenue Acts. In evaluating the force of these statements, basic to the Commissioner's argument, we believe the Court should give consideration to the following factors:

First. The vast majority of fluctuations in value of property are, by statute, and perhaps constitutionally, "immunized from tax effect." Gain or loss upon the sale or exchange of property is measured by comparison of the amount realized with the statutory cost basis. Interim fluctuations in value during the period of holding are without tax effect.

Second. As the Commissioner must and does admit, though he would dismiss it as of slight significance, the

Revenue Acts of 1928 and 1932, under which these cases arise, did clearly and indubitably provide for and establish such a "gap" as the Commissioner would have the Court believe was contrary to consistent Congressional policy. Section 113(a)(5) of those statutes did specifically provide that property acquired by will or intestacy should have as its cost basis not value at the date of death, but value at the time of distribution to the taxpayer, an event necessarily occurring some appreciable time after death. If it should be granted that the Commissioner were correct about a plan or scheme under earlier and later statutes, still it would be obvious that this assumed uniformity was abandoned in 1928, and no reason appears why the concededly new pattern of 1928 and 1932 should be expected to produce the old product of 1926 and prior years. And even if, in 1934, Congress did reconsider and revert to the earlier pattern, still the change then made is hardly to be considered as effective *nunc pro tunc*. It requires considerable ingenuity and some skill in dialectics to treat the Revenue Acts of 1928 and 1932 as though they had never existed.

Third. It is by no means clear that under provisions in other Acts corresponding to Section 113(a)(5) in the 1928 and 1932 Acts, value at date of death in all cases was the factor which established cost basis. The Commissioner and the lower Courts uniformly thought otherwise for a number of years (*infra*, p. 46; Appendix B, pp. viii-xi); the House, proposing so to enact in 1928, thought it necessary to amend the statute; and only recently a conflict in the Circuit Courts of Appeals with reference to the 1934 Act has developed, and has resulted in the granting of a writ of certiorari by this Court. *Cf. Reynolds v. Commissioner*, 114 F. (2d) 804 (C. C. A. 4th, 1940), No. 684, present Term, cert. granted, Feb. 17, 1941; *Van Vranken v. Helvering*, 115

F. (2d) 709 (C. C. A. 2d, 1940); *Archbold v. Helvering,* 115 F. (2d) 1005 (C. C. A. 2d, 1940); *Augustus v. Commissioner,* C. C. A. 6th, Feb. 14, 1941.

Fourth.. For the past twenty years, out of the twenty-eight since the enactment of the Sixteenth Amendment, value of property as of the date of a gift has not established its cost basis to the recipient. (For detail, See Appendix B, pp. xiv-xv.) From 1920 to 1934 not value at the time of the gift, but the donor's cost, established the donee's cost basis. True, there was no time gap here after the date of the gift until cost to the donee should be established, but there was an overlap, which is equally inconsistent with the Commissioner's uniform pattern. And since 1934, what remained of consistency here has quite completely disappeared, since now in some cases the donor's cost is the basis, in others value at the time of the gift, and in still others the statute produces a stalemate in which neither of these costs bases is accepted and in effect the donee's selling price is treated as his cost basis, since neither gain nor loss will be recognized. The difference between the treatment of property acquired by direct gift (Section 113(a)(2)) and property transferred in trust *inter vivos* (Section 113(a)(3)) is a conspicuous illustration of this lack of uniformity even as between types of property very similarly acquired. *Cf. Edward T. Bedford Trust,* 42 B. T. A. 748 (1940).

Fifth. The Commissioner's argument implies, if it does not specifically state, a neat but non-existent integration of income, gift and estate tax statutes with reference to values and cost bases. The simplicity of plan assumed by the Commissioner would perhaps arise if the value of property employed in assessing gift and estate taxes thereupon became the income tax cost basis of the property in the hands of the recipient—if a taxable event under

gift and estate tax statutes always gave the property transferred a new and corresponding cost basis under the income tax statute. But this integration, this plan, has never existed. Under the gift tax statute, the gift tax is based upon the value of property at the time of the gift, while the donee's cost basis reverts to that of the donor. *Cf. Taft v. Bowers*, 278 U. S. 470 (1929). Under the estate tax statute, assessment may, since 1935, be based either upon the value at time of death or value one year thereafter. Internal Revenue Code §811(j). Yet the latter date is of no significance in ascertaining cost basis for income tax purposes. I. T. 3340, 1939-2 Cum. Bull. 167. So with property included in an estate, as having been transferred in contemplation of death, there is no reference to the estate proceeding in establishing the basis for cost for income tax purposes. Moreover, in those cases where the statute does provide that the value of property at the date of death shall be the recipient's cost basis, the value used in determining the estate tax is evidence, but only evidence, of value for determining the cost basis for income tax purposes. *May Rogers*, 31 B. T. A. 994 (1935), aff'd, 107 F. (2d) 895 (C. C. A. 2d, 1939); *Stella H. McConnell*, 29 B. T. A. 32 (1933). These are but a few of the possible examples which, together with the section here under consideration, show a complete lack of the integration with regard to statutory cost bases, the illusion of which is so carefully nursed by the Commissioner. *Cf. McFeely v. Commissioner*, 296 U. S. 102, 110 (1935).

Sixth. In choosing a time as of which market value shall establish a cost basis for income tax purposes, the factor of proximity or remoteness to some other event or time (here date of death) has no significance to the public revenues. Taxpayers like high cost bases; the government

profits from low cost bases. It is pure accident, dependent upon the unpredictable rise or fall of property values, whether an early date upon which cost basis shall be ascertained will help or hurt the revenues. If decedent *A* died in September, 1928, and his estate were distributed in September, 1929, the use of the earlier date would help the government. On the other hand, if decedent *B* died in September, 1929, and his estate were distributed in September, 1930, the use of the earlier date would help the taxpayer. It requires more than the Commissioner's easy rationalizing to find an expression of fiscal policy in the Congressional choice of one date rather than the other. The reports do not fail to furnish cases in which the Commissioner found it to the advantage of the public revenues to contend, and did contend, for the choice of the later dates for basis-establishing purposes. *Harry G. Haskell,* 30 B.T.A. 855 (1934), aff'd, *Haskell v. Commissioner,* 78 F. (2d) 869 (C. C. A. 3d, 1935), cert. denied, 296 U. S. 652 (1935); *Bessie C. Williamson,* 34 B. T. A. 668 (1936), modified, 34 B. T. A. 924 (1936), aff'd, *Williamson v. Commissioner,* 100 F. (2d) 735 (C. C. A. 6th, 1938), cert. denied, 307 U. S. 623 (1939); *William P. Clyde, Jr.,* 32 B. T. A. 799 (1935); *Margaret E. B. Fleming,* 36 B. T. A. 773 (1937).

2. The Commissioner's assumption that opportunities for tax avoidance are greater under the construction of Section 113(a)(5) contended for by the respondents than under his own, is characteristic of the fictions upon which he founds most of his argument (Commissioner's *Maguire* Brief, No. 346, pp. 18-19, 28). The Commissioner intimates that the difference in time between the length of an executor's holding of securities and of the holding of a trustee provides such an opportunity. But length of time of holding has no necessary relationship to the fluctuation of value in securities and hence to the desire to avoid taxation. The

experience of the 1929 crash shows that the sharpest drop in securities may be during a very short period, as well within the period of executorship as the term of a testamentary trust. In fact, the fluctuation in value during executorship has been so great that Congress has permitted an optional date of valuation for estate tax purposes to prevent taxation in excess of the liquidated value of the estate. Internal Revenue Code §811(j).

Actually, the contrary of the Commissioner's contention is true. The basis of value at the time of delivery from executor to trustee, for which the Commissioner contends, gives a greater opportunity for avoidance than the basis of value at the time of delivery to the respondents, for which the respondents contend. Under the Commissioner's contention not only may the parties determine which of two taxpayers is to sell the property but in addition the parties are entirely free to choose the time when the basis-establishing delivery shall be made. This opportunity to choose an advantageous time is never open to the same extent in the case of a transfer from a testamentary trustee to the remainderman, since testamentary trusts almost without exception end on a fixed date, either the date of death of the life tenant, or a fixed number of years. The trustee must deliver the trust property as soon thereafter as is possible. Necessarily the opportunities for picking an advantageous time for establishing a cost basis are less after the death of a life tenant than during that amorphous period when an estate administration is to be terminated and a testamentary trust set up.

Further, the Commissioner forgets that a trustee is not an individual owning property in his own right but is a fiduciary, limited strictly by law and by the terms of the will in the administration and distribution of the trust estate.

E. The Maguire Case.

Only the decision of the Seventh Circuit Court of Appeals in *Commissioner v. Maguire,* 111 F. (2d) 843 (C. C. A. 7th, 1940), is contrary to the respondents' contentions. The respects in which the Court was misled in that case are disclosed in its opinion.

The Court, without exception, paraphrased the third sentence of Section 113(a) (5) to read: "If property is acquired by general bequest * * *." In fact, the statute reads: "*In all other cases* if the property is acquired either by will or intestacy * * *." Having thus narrowed the statutory language, it was not difficult for the Court to exclude property purchased by a fiduciary from its scope and to limit its applicability to the period of the executorship.

The Court also went astray in its analysis of the legislative history of Section 113(a) (5). Writing with reference to the changes effected by the Senate in the House version of that section, the Court says (at p. 846) that the Senate deemed the House bill weak "in *one* respect, in that it failed to take care of the situation where the executor, pursuant to the terms of the will, may purchase property and distribute it to the beneficiaries." The fact is that the Senate Report said that the House bill was inadequate in "a *number* of situations" and the instance of property purchased by an executor was specifically stated to be only an "example" of those situations.

The Court's great reliance (at p. 847) upon the title of Section 113(a) (5), which, as we have pointed out above, is utterly without significance, and its dependence (at p. 847) upon the "substantially vested equitable ownership (of the taxpayer) at the time of distribution to the trustee," are simply further illustrations of the insecure foundations

upon which the Court rested its decision. *Cf. Helvering v. San Joaquin Fruit & Investment Co.*, 297 U. S. 496 (1936). Significantly, the Court frequently referred to Ruth S. Maguire (the respondent below) as "the taxpayer," but in paraphrasing the statutory language "distribution to the taxpayer," it used either the phrase "distribution to the trustees" or the phrase "distribution by the executors."

We respectfully submit that the careful analysis by the Circuit Court of Appeals for the Second Circuit in its opinion below in these cases leads to the correct construction of the statute and results in faithful observance of the clearly expressed intention of Congress.

SECOND POINT

Respondent Knox held the securities sold by him in 1930 for less than two years, within the meaning of Section 101(c) (8) of the Revenue Act of 1928. Hence the securities were not capital assets and his loss was not a capital loss.

A. There is no authority in Section 101(c) (8) for tacking to the respondent's period of holding the prior period of holding by the testamentary trustees.

The second issue presented is whether the loss resulting from the sale of certain securities by the respondent Knox on June 10, 1930 (Knox, No. 474, R. 22) was an ordinary loss or a capital loss. These securities were distributed to Mr. Knox pursuant to the provisions of Article Twenty-first (C) of his father's will upon his attaining the age of thirty years on September 1, 1928 (Knox, No. 474, R. 22). The securities thus sold had been purchased by the testamentary trustees in part on August 31, 1927, and in part on August 30, 1928 (Knox, No. 474, R. 21, 22). Hence, the securities were sold less than two years after they were distributed to Mr. Knox by the trustees but more than two years after the securities had been purchased by the trustees.

The controlling statute is Section 101 of the Revenue Act of 1928 which defines a capital loss as a loss resulting from the sale or exchange of "capital assets", and which defines "capital assets" as "property *held* by the taxpayer for more than two years" (Italics ours).

Section 101(c)(8) prescribes the circumstances under which the period of holding of the taxpayer shall be deemed to include the period for which the property is held by another taxpayer. The only paragraph of this section which is applicable to the instant case is paragraph (B) which reads as follows:

> "(B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person."

Under Section 701(a)(1) of the Revenue Act of 1928, a "person" is defined as meaning, among other things, "an individual, a trust or estate * * *." Consequently, the testamentary trustees constitute an "other person" within the meaning of paragraph (B). The trustees' period of holding may not be added to Mr. Knox's period of holding unless "under the provisions of Section 113 such property has for the purpose of determining gain or loss * * * the same basis * * * in his hands as it would have in the hands of such other person."

This view appears to be at least tacitly concurred in by the Commissioner in his argument at pp. 25-26 of his *Gambrill* Brief, Nos. 472-475. Any other view would read paragraph (B) altogether out of the statute in so far as testamentary acquisitions are concerned. Or, stating it differently, it would amount to construing the reference in Sec-

tion 101(c)(8)(B) to Section 113 as if it read "Section 113 (except sub-paragraph (a)(5) thereof)."

In the First Point we have contended that Mr. Knox's basis in the property sold by him in 1930 is the fair market value thereof on the date it was distributed to him by the testamentary trustees. If this is so, the period of holding of the trustees may not be tacked to the period of holding of the respondent in determining whether the securities sold by the latter constitute capital assets.

The Court below so held (Knox, No. 474, R. 68). On this point the Circuit Court of Appeals said:

> "The second question is whether the securities passing to the respondents Gambrill and Knox were held by them for more than two years and hence whether any gain or loss realized by the sale was taxable not as ordinary income or loss but as a capital gain or loss because the securities were 'capital assets' as defined in Section 101(c)(8) and (B) of the Revenue Act of 1928. The Board held that they were not, and they plainly were not unless the period during which they were held by the trustees can be added to the period between the date of distribution to the taxpayers and the date of sale. There cannot be any such tacking because the property, when held by the respective respondents, did not have 'for the purpose of determining gain or loss from a sale * * *, the same basis * * * in his hands as it would have in the hands' of the trustees."

B. The McFeely cases, upon which the Commissioner relies, did not involve an intervening trust and are not controlling in this case.

The Commissioner contends that the cases entitled *McFeely v. Commissioner*, 296 U. S. 102 (1935) are controlling and that under them the period of holding in the instant case must be computed from the dates of the purchase of the securities by the trustees. In the *McFeely* cases the several taxpayers had received property either by residuary bequest, by widow's right of election, or by intestacy. No

testamentary trust was involved and none of the taxpayers before the Court was a remainderman. Each of the taxpayers sold property which had been distributed to him by the representatives of a decedent's estate. The Revenue Act of 1928 was involved. This Court held that the period for which the property was held, within the meaning of the capital gain and loss provisions of the statute, must be computed from the date of the decedent's death. The *McFeely* decisions were by a divided Court. Three Justices dissented upon the grounds assigned by the Second Circuit Court of Appeals in *Ogle v. Helvering*, 77 F. (2d) 338 (C. C. A. 2d, 1935), rev'd, 296 U. S. 103 (1935).

In the *Knox* case the Circuit Court of Appeals held that since the *McFeely* cases "involved an estate where there was no trust" and since this Court "only decided that the general legatee held the securities which were transferred to him by the executor at date of death," those cases were not controlling here (Knox, No. 474, R. 69). The Board of Tax Appeals reached the same conclusion (Knox, No. 474, R. 49, 50).

In the *McFeely* cases, this Court said at p. 107:

> "In common understanding to hold property is to own it. In order to own or hold one must acquire. The date of acquisition is, then, that from which to compute the duration of ownership or the length of holding. * * *"

In *Helvering v. San Joaquin Fruit & Investment Co.*, 297 U. S. 496 (1936), where the issue was whether a tenant-optionee of land "acquired" the land at the time the option was taken or at the time the property was conveyed to the lessee on the exercise of the option, the Court explained (p. 499):

> "* * * The word 'acquired' is not a term of art in the law of property but one in common use. The plain import of the word is 'obtained as one's own.' Language used in tax statutes should be read in the ordinary and natural sense. * * *"

The Court's definition of the word is in accord with the meaning uniformly given it by the standard dictionaries. Some of these appear in the footnote.[10]

Not only does this Court's definition of the word "acquired" support respondent's position but the commonly accepted and ordinary meaning of the word "held," the specific word employed in Section 101(c)(8), even more completely compels the conclusion for which we contend. To say that a remainderman has "held" property during the time title to it is in testamentary trustees, where it may rest forty, fifty or more years, is to distort the word "held" beyond recognition. This is particularly true where the remainderman's interest is entirely conditional and where he has only a possibility of receiving anything under the will.

In the instant case Mr. Knox, unlike the taxpayers in the *McFeely* cases, is not one who acquired property from a decedent after a "withholding of possession for purposes of administration." He is the remainderman of a testamentary trust who did not acquire any interest in the specific property constituting the trust until the property was distributed to him by the trustees. We are not concerned with the respondent's period of holding of his remainder interest because he did not sell his remainder. We are concerned solely with his period of holding of the particular securities which he sold. During the continuance of the trust the trustees had the "whole title and estate" in the securities. *Whiting v. Hudson Trust Co.*, 234 N. Y. 394, 407 (1923); *Backer v. Levy*, 82 F. (2d) 270 (C. C. A.

[10] Webster's New International Dictionary, Second Edition (1934): "to get as one's own"; Bouvier's Law Dictionary: "To make property one's own. To gain permanently"; Funk & Wagnall's Practical Dictionary: "get as one's own"; Oxford Universal English Dictionary: "1. To gain or get as one's own * * *. 2. To receive, to come into possession of."

2d, 1936); I Restatement, Trusts (1935) §88; I Scott on Trusts (1939) §88.1. The respondent's interest was only "a chose in action, the right to enforce in equity the performance of the trust." *Whiting v. Hudson Trust Co., supra; Anderson v. Wilson,* 289 U. S. 20 (1933). See, *Archer-Shee v. Garland,* [1931] A. C. 1222, for a discussion of the New York law.

Under the provisions of the will the trustees had full powers of sale and reinvestment and by virtue of the exercise of these powers Mr. Knox might never have acquired the securities in question (Knox, No. 474, R. 33, 34). The gift to Mr. Knox under the provisions of the will was expressly conditioned upon his survival to the required age (Knox, No. 474, R. 32). In the event that Mr. Knox did not survive to the required age there was a gift over (Knox, No. 474, R. 32, 33). By reason of these provisions it is clear that Mr. Knox or his estate might never have received these particular securities or any other trust property. It was not until they were distributed to him that the taxpayer's interest became absolute and unconditional. The securities in question were not obtained as his own under the principle of the *San Joaquin* case until they were distributed to him free of trust. He could not have held them prior to that distribution and his period of holding dates from that time.

C. In view of the uncertain and conditional nature of the respondent Knox's remainder interest, he held the securities which he sold in 1930 only from the date of his thirtieth birthday when his interest became indefeasible and the securities were distributed to him by the testamentary trustees.

We have pointed out above that because of the intervening trust Mr. Knox had no property interest in the securities, and could not be said to hold them, until the trust terminated and they were distributed to him. We have also pointed out that because the gift to Mr. Knox was conditional upon his reaching a specified age, with a gift over in

case he failed to do so, it was more than possible until he reached that age that he would never acquire or "hold" the securities. We believe that this second factor, the factor of uncertainty, deserves further consideration, and that it makes clear beyond doubt that Mr. Knox's period of holding cannot extend farther back than the date on which he reached the age of thirty years, when he first became unconditionally entitled to the corpus of the trust and when, in fact, the securities were delivered to him.

In this connection the Commissioner states (Commissioner's *Gambrill* Brief, Nos. 472-475, pp. 31-34) that we place our reliance upon the distinction between technically contingent and technically vested estates, and not upon the difference between absolute and conditional interests. This is totally incorrect. Our reliance is upon the word "held" as used in Section 101(c) (8) of the Revenue Act of 1928, and, in this connection, upon what we believe to be the clear logic of the proposition that one cannot be deemed to hold, or to have held, property which, whatever the technical nature of the remainder interest, one may never obtain or acquire. To this position we believe the recent decision of this Court in *Helvering v. Hallock*, 309 U. S. 106 (1940) lends powerful support. Since the Commissioner, too, claims support from that decision, it becomes important, in order to resolve the conflict, to state clearly the situation here, the effect of the decision in the *Hallock* case, and its applicability here.

At the outset it is to be clearly understood, and it is undisputed, that had Mr. Knox failed to reach the age of thirty years, neither he nor his estate would have received the trust corpus or any interest therein. Had that event occurred the securities making up that corpus would have gone in accordance with the terms of the gift over. The gift, therefore, was "rendered incomplete" (309 U. S. at 114) by the terms of the trust instrument until the re-

mainderman reached the age of thirty. Whether his interest was technically contingent or not, it was not assured—it was what we shall call "conditional," in contradistinction to the technical term "contingent." "It is perfectly plain that [reaching the age of thirty] was the indispensible and intended event which brought the larger estate into being for the grantee and effected its transmission from the dead to the living." *Helvering v. Hallock*, 309 U. S. at p. 111.

What, then, did the *Hallock* case determine? That case and its predecessors[11] involved *inter vivos* trusts, each with a gift to a remainderman conditional upon his surviving the grantor, or subject to defeasance if he did not so survive. The question in each case was whether, for estate tax purposes, these were transfers "intended to take effect in possession or enjoyment at or after [the grantor's] death." Section 302(c), Revenue Act of 1926. In the *St. Louis Union Trust* cases it was held the test was whether the remainders were contingent or were vested subject to defeasance. In the *Hallock* case this test was renounced and overruled, this Court saying (p. 118) that under it "Essentially the same interests, judged from the point of view of wealth, will be taxable or not, depending upon elusive and subtle casuistries which may have their historic justification but possess no relevance for tax purposes." Instead the Court turned to the "harmonizing principle" (309 U. S., p. 118) of the *Klein* case, *i. e.*, "Nothing is to be gained by multiplying words in respect of the various niceties of the art of conveyancing or the law of vested and contingent remainders. It is perfectly plain that the death of the grantor was the indispensible and intended event which brought the larger estate into being for the grantee and effected its transmission from the dead to the living, thus satisfying the terms of the tax-

[11] Klein v. United States, 283 U. S. 231 (1931); Helvering v. St. Louis Union Trust Co., 296 U. S. 39 (1935); Becker v. St. Louis Union Trust Co., 296 U. S. 48 (1935).

ing act and justifying the tax imposed." (309 U. S. at p. 111)

How, then, does that decision affect the present case? The decision there was that since the death of the grantor did in substance free from uncertainty the grantee's interest, the transfer was one which "took effect" at the time of the grantor's death, regardless of the technical nature of the grantee's remainder interest. Here the remainderman Knox was in the same position as the grantee in the *Hallock* case. Whatever the nature of his remainder interest, he must survive to his thirtieth birthday in order to receive the property. And here the question is when the respondent Knox did begin to "hold" the property he then received. To hold or own, this Court has held, one must acquire, one must obtain as one's own.[12] And one has not done that, the Court has held, when one has an equitable interest in property conditional upon payment of the purchase price.[13] Similarly, it is obvious that the grantee in the *Hallock* case did not, prior to the grantor's death, own, and was not holding the property there taxed. If the grantee had owned prior to that time, the transfer would not have taken effect at death, and there would have been no tax. So here, prior to the time the respondent Knox reached thirty, whatever the technical nature of his remainder interest, he did not own or hold the property in question. The transfer to him "took effect" when he reached thirty, and he then for the first time began to own and hold the property which then became his.

On the basis of this reasoning it is apparent that we believe the Commissioner is correct in his arguments (Commissioner's *Gambrill* Brief Nos. 472-475, pp. 17-18, 30-35)

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[12] Helvering v. San Joaquin Fruit & Investment Co., 297 U. S. 496 (1936); McFeely v. Commissioner, 296 U. S. 102 (1935).

[13] Helvering v. San Joaquin Fruit & Investment Co., supra, note 12.

that it is immaterial whether the respondent's remainder was technically vested or contingent. But by the same token, we believe the Commissioner is indubitably wrong when he asserts that the respondent "held" the securities making up the corpus of the trust before he reached the age of thirty years. The Commissioner's premise we here accept and urge as correct. His conclusion is without logic to support it. In its recent decision in *Van Vranken v. Helvering*, 115 F. (2d) 709 (C. C. A. 2d, 1940), relied upon by the Commissioner, we believe it patent that the Court, in an analogous situation, fell victim to the same fallacy in its application of the *Hallock* decision.

Both the Commissioner and the Court in the *Van Vranken* case properly brush aside the technical distinction between vested and contingent remainders. But both then proceed to treat all remainders as unconditional and conveying absolute ownership. This is squarely opposed to the decision in the *Hallock* case. If their conclusion were correct, there could have been no tax in the *Hallock* case, since the remainderman would have owned the property prior to the grantor's death, and the transfer could not have been held to have taken effect upon that event.

The position we have here set forth rests squarely upon the recent decisions of this Court. We believe this position sound and that it requires a decision for the respondent on this issue.

An alternative position is possible. It is based upon the technical contingency of the remainder and the familiar "re-enactment rule" for the construction of statutes. This position also requires a decision for the respondent Knox on this issue.

From 1920 until 1935 the Bureau of Internal Revenue consistently ruled that one did not "acquire" property so

long as the interest in the property remained contingent. In G. C. M. 10260, XI-1 Cum. Bull. 79, 80 (1932), General Counsel to the Bureau stated:

> "* * * the position of this office has been that one who has a mere contingent interest does not 'acquire' the property in question until his interest becomes vested. (O. D. 727, C. B. 3, 53; S. M. 4640, C. B. V-1, 60.) (See also I. T. 1622, C. B. II-1, 135; S. O. 35, C. B. 3, 50)"

The ruling O. D. 727, 3 Cum. Bull. 53, cited by the General Counsel, was promulgated in 1920. This ruling and other rulings to like effect remained in full force and effect until 1935.

The same test was applied by all of the Circuit Courts of Appeals to which the question had been presented prior to the enactment of the Revenue Act of 1934.[14]

Therefore, at the time of the enactment of this Act, which, in Section 113(a)(5) reverted to the phrase "time of acquisition" of the 1926 and earlier Acts, the word "acquired," as applied to contingent remainders, had received a uniform administrative and judicial construction.[15]

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[14] Lane v. Corwin, 63 F. (2d) 767 (C. C. A. 2d, 1933), cert. denied, 290 U. S. 644 (1933); Pringle v. Commissioner, 64 F. (2d) 863 (C. C. A. 9th, 1933), cert. denied, 290 U. S. 656 (1933); Becker v. Anchor Realty & Investment Co., 71 F. (2d) 355 (C. C. A. 8th, 1934); Louis Kalb, 15 B. T. A. 886 (1929). The same test was applied in other cases in which, however, the Courts held the remainders to be vested. Chandler v. Field, 63 F. (2d) 13 (C. C. A. 1st, 1933), cert. denied, 289 U. S. 758 (1933); Molter v. Commissioner, 69 F. (2d) 7 (C. C. A. 7th, 1934); Hopkins v. Commissioner, 69 F. (2d) 11 (C. C. A. 7th, 1934), cert. denied, 293 U. S. 560 (1934); Rodman E. Griscom, 22 B. T. A. 979 (1931); Harry C. Kayser, 27 B. T. A. 816 (1933); Grace L. Wright, 29 B. T. A. 1033 (1934).

[15] This distinction between contingent and vested remainders has uniformly been applied in cases decided after the enactment of the Revenue Act of 1934. Warner v. Commissioner, 72 F. (2d) 225 (C. C. A. 2d, 1934), cert. denied, 293 U. S. 620 (1934), aff'g, 28 B. T. A. 1178; Beers v. Commissioner, 78 F. (2d) 447 (C. C. A. 3d, 1935), cert. denied, 296 U. S. 620 (1935); Forbes v. Commissioner, 82 F. (2d) 204 (C. C. A. 1st, 1936); Twining v. Commissioner, 83 F. (2d) 954 (C. C. A. 2d, 1936), cert. denied, 299 U. S. 578 (1936).

This Court has said that under such circumstances Congress must be presumed to have used the language in question in its settled and accepted sense. *Case v. Los Angeles Lumber Products Co.*, 308 U. S. 106, 115 (1939); *Hecht v. Malley*, 265 U. S. 144, 153 (1924); *Latimer v. United States*, 223 U. S. 501, 504 (1912).[16] If this is correct, the enactment of Section 113(a)(5) of the Revenue Act of 1934 may be said to indicate that the prior administrative and judicial construction of the term "acquire" was in accordance with the legislative intent with reference to it. *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U. S. 110 (1939); *Morgan v. Commissioner*, 309 U. S. 78 (1940).

If the above suggested application of the "reenactment rule" is controlling here, the decision must be for the respondent. As we shall indicate below, the remainder interest of the respondent Knox was contingent under the law of New York until it vested on his thirtieth birthday (*infra*, pp. 49-51). Therefore, applying the test of technical contingency heretofore accepted by the Circuit Courts of Appeals, the respondent did not acquire, and cannot be said to have held, until his thirtieth birthday, the securities which he sold within two years from that date.

Recently a conflict has developed between the Fourth and the Second Circuit Courts of Appeals with reference to

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[16] On this point see also discussion of Mr. Roswell Magill, the representative of the Treasury Department at the hearings on the 1934 Act and later Under Secretary of the Treasury, in his book Taxable Income (1936), pp. 388, 389: "The courts, however, have clung tenaciously to the vested-contingent distinction. * * In its recent regulations, however, the Treasury has abandoned the distinction and declared that hereafter the basis shall be the value as of the date of the creation of the remainder in all cases. In view of the court decisions in the cases cited, the effectiveness of this administrative action is questionable. If there is merit in the argument that Congress, by reenacting prior statutes which have been uniformly interpreted by the Treasury, has given such interpretations the force of law, then it should take Congressional action to change the interpretation."

the construction of the word "acquire" in Section 113(a)(5) of the Revenue Act of 1934, in so far as it is applicable to contingent remainders.[17] In *Reynolds v. Commissioner*, 114 F. (2d) 804 (1940), pending in this Court on writ of certiorari, No. 684, the Fourth Circuit Court of Appeals held that the above outlined legislative history of Section 113(a)(5) of the 1934 Act required a continued application of the test of contingency in determining the time of acquisition. In *Van Vranken v. Helvering*, 115 F. (2d) 709 (1940) the Second Circuit Court of Appeals traced this same legislative history, and stated that it would have followed the *Reynolds* case but for what it considered the prohibitive implications of the decision of this Court in the *Hallock* case. In so far as it may be considered analogous to the present case, we have already indicated that we accept the premise of the *Van Vranken* case as it disregards the technical distinctions between vested and contingent remainders. The error into which the Court there fell was in proceeding from its premise to the illogical conclusion of treating all remainders as giving absolute ownership, whereas the decision in the *Hallock* case abandoned the distinction between vested and contingent remainders, but clearly recognized the difference between absolute and conditional interests, as, in fact, it was required to do in order to uphold the tax imposed in the *Hallock* case.

We, therefore, do not urge upon the Court one of the alternative positions rather than the other. While it is our opinion that the distinction made in the *Hallock* case, as we believe it should be applied, between absolute and

[17] The Sixth Circuit Court of Appeals has recently joined with the Second Circuit Court of Appeals on this question. Augustus v. Helvering, decided February 14, 1941. The decision turns upon a treatment of the legislative history of the section which is contrary to the conclusions on that matter of both the Second and Fourth Circuit Courts of Appeals.

conditional ownership, is sounder than the test depending upon the vested or contingent nature of the remainder, the decision on this issue must in either event be in favor of the respondent.

D. If considered material, the respondent Knox's remainder was, under the law of New York, contingent until he attained the age of thirty years on September 1, 1928.

The New York law is settled and clear as to the vesting of remainders such as that here in question, and under it the remainder of Mr. Knox was contingent until he arrived at the ages specified in his father's will. The Board of Tax Appeals in its decision below so found (Knox No. 474, R. 50; Campbell, No. 473, R. 115).

The primary criterion of vesting in New York is the intention of the testator. *Lewisohn v. Henry,* 179 N. Y. 352, 361 (1904); *Cammann v. Bailey,* 210 N. Y. 19, 30 (1913); *Lane v. Corwin,* 63 F. (2d) 767, 769 (C. C. A. 2d, 1933), cert. denied, 290 U. S. 644 (1933). In the Knox will the testator expressed his intention to make a future rather than a present gift in exact words, *i. e.,* following the gift of income until the beneficiary arrived at a certain age, he provided, "at which time, I give, devise and bequeath" a portion of the trust fund (Knox, No. 474, R. 32). The entire testamentary scheme of the Knox will of successively postponing the gifts until the beneficiary should reach a maturity sufficient to care for an estate of such size likewise evidences this intention in the clearest manner. The New York Court of Appeals has long held that remainders created under provisions indistinguishable from those in the Knox will do not vest until the required age is reached. *Lewisohn v. Henry,* 179 N. Y. 352 (1904); *Fargo v. Squiers,* 154 N. Y. 250 (1897), approving on this point, 6 App. Div. 485, 39 N. Y. Supp. 648 (1st Dept. 1896); see *Matter of*

Trevor, 239 N. Y. 6, 14 (1924); *Dimmick v. Patterson*, 142 N. Y. 322, 326 (1894).

This intention of the testator is reinforced by the existence in the Knox will of a gift over on the death of the beneficiary before reaching the required age (Knox, No. 474, R. 32). It is established in New York that the presence of such a gift over, after a gift postponed until arrival at a certain age, is a controlling indication that the remainder is contingent. *Fargo v. Squiers, supra; Smith v. Edwards*, 88 N. Y. 92, 107 (1882); *Greenland v. Waddell*, 116 N. Y. 234, 244 (1889); *Clark v. Cammann*, 160 N. Y. 315, 326 (1899). The absence of such a gift over requires that the gift be held to be vested. *Fulton Trust Co. v. Phillips*, 218 N. Y. 573, 581 (1916); *Matter of Inslee*, 233 App. Div. 144, 146, 251 N. Y. Supp. 251, 253 (4th Dept. 1931).

In *Lewisohn v. Henry, supra*, the pivotal ground for decision was the intention of the testator to make a future gift as evidenced by facts substantially identical with those under the Knox will. The respondents rely upon *Lewisohn v. Henry* as a holding to that effect. The "divide and pay over rule" is obviously not applicable to the Knox will and the respondents do not cite *Lewisohn v. Henry* for this purpose or rely upon the "divide and pay over rule." That *Lewisohn v. Henry* is still law is shown by the reliance upon this case in *Matter of Trevor*, 239 N. Y. 6, 14 (1924), one of the most recent decisions of the Court of Appeals on vesting.

The Commissioner states that the respondents, in maintaining that the remainders are contingent, do not rely upon the existence of a gift over in the event of the failure of the life beneficiary to survive, and that they do rely upon the "divide and pay over rule." He then proceeds to argue at length on this assumption. (Commissioner's *Gambrill* Brief, Nos. 472-475, pp. 34, 38-45.) The respondents have never

made the arguments imputed to them either in the Board or the Court below and do not now make such argument.

The law of New York on vesting is notoriously complex. As applied to the instant facts, however, it has been settled by the Court of Appeals in the cases cited above. The Commissioner's argument to the contrary consists simply of throwing in unrelated complexities to seek decision in his favor in the resulting confusion. Thus the doctrine of *Moore v. Littel*, 41 N. Y. 66 (1869), injected into the argument by the Commissioner at pp. 36, 37, 39 and 40 of his *Gambrill* Brief, Nos. 472-475, is a classic New York oddity which, if it has continued life in New York, is applicable only in its particular fact situation. See Walsh, *Future Estates in New York* (1931) §8; Chaplin, *Suspension of the Power of Alienation* (3d ed. 1928) §§569-582; I Simes, *Future Interests* (1936) §§83-85. Likewise, the "divide and pay over rule" cases cited in profusion by the Commissioner are entirely beside the mark. If any of these cases are intended as direct authority, they are patently to be differentiated on the peculiarities of the will or other facts in question or on the absence of a gift over. For example, the decision in *Cammann v. Bailey*, 210 N. Y. 19 (1913) (cited at p. 44 of the Commissioner's *Gambrill* Brief, Nos. 472-475), as shown by the concurring opinion (210 N. Y. at p. 32), turned entirely upon a minute peculiarity of the will there involved.

Matter of Vanderbilt, 172 N. Y. 69, 72 (1902), in the respect relied upon by the Commissioner, is purely dictum contained in an opinion in which only three out of seven Judges of a sharply divided Court concurred. In so far as it is inconsistent with the later cases of *Lewisohn v. Henry, supra*, and *Matter of Trevor, supra*, this dictum must be taken to have been disapproved by the Court of Appeals.

THIRD POINT

In applying the "first in, first out" rule the Woolworth stock purchased by the respondent Campbell prior to distribution to her by the testamentary trustees of other Woolworth shares must be deemed to be "first in" and must be regarded as sold first.

Prior to July 10, 1928, the respondent Campbell purchased 1,000 shares of Woolworth stock out of her personal funds (Campbell, No. 473, R. 18). On July 10, 1928, her twenty-eighth birthday, there were distributed to her by the testamentary trustees pursuant to the will, 15,000 additional shares of Woolworth stock, which shares were owned by the trustees prior to the date of her individual purchases (Campbell, No. 473, R. 18). In 1929, on a recapitalization of the Woolworth Company, Mrs. Campbell received 40,000 shares of new stock in exchange for the 16,000 shares which she then held (Campbell, No. 473, R. 18). In 1933 she sold 10,000 shares of the new stock, which shares could not be identified as being derived either from her personal purchases of the old stock or from the 15,000 old shares received from the trustees on July 10, 1928 (Campbell, No. 473, R. 18).

The question is, what basis should be assigned to the 10,000 shares sold in 1933 for the purpose of determining the gain or loss thereon?

The parties are in agreement that the "first in, first out" rule should be applied. (The "first in, first out" rule will not be found in the statute. It appears in Article 58 of Treasury Regulations 77 promulgated under the Revenue Act of 1932.) Article 58, in so far as it is material, is as follows:

> "When shares of stock in a corporation are sold from lots purchased at different dates or at different prices and the identity of the lots can not be determined, the

stock sold shall be charged against the earliest purchases of such stock. In the determination of the earliest purchases of stock the rules prescribed in subparagraphs (A), (B), (C), and (D) of section 101 (c) (8) (relating to the period for which property has been held) shall be applied. * * *"

It is respondent Campbell's contention that the rule should be so applied as to exhaust first her individual purchases made prior to the distribution to her of any shares from the trust. This was the holding of the Board of Tax Appeals (Campbell, No. 473, R. 115):

"The rule should receive a practical and reasonable application. It means purchased by the particular taxpayer. A person should not be deemed to have purchased property prior to the time that he purchased it or acquired the title to it, unless there is some express statutory provision to that effect."

The Court below affirmed the Board of Tax Appeals and in its opinion (Campbell, No. 473, R. 139) said:

"* * * During the time that the title to the shares remained in the trustee the taxpayer had no control over their disposition and they were not acquired until she obtained them as her own."

There are no decisions or rulings to the contrary. Hence, this Court is not called upon to resolve any conflict as to this issue.

While the rule as stated in Article 58 of Regulations 77 refers to lots of stock "purchased" at different dates or at different prices, the application of the rule may not be limited to securities which have been purchased as distinguished from those which have been otherwise obtained. The rule incorporates by reference the rules of tacking set out in subparagraphs (A), (B), (C) and (D) of Section 101(c)(8).

The Commissioner's theory is that the "first in, first out" rule requires a sequence consistent with the order of "acquisition" in the sense in which that word is used

in *Brewster v. Gage*, 280 U. S. 327 (1930). This is clearly unsound. Nothing in Article 58 of the Regulations requires the application of the order of constructive acquisition as distinquished from actual acquisition. Nor does the rule embrace any of the technical concepts involved in definition of the word "held" as used in Section 101(c)(8) of the statute. Paragraph 8 of that section is not made part of the rule. Only the rules of tacking found in subparagraphs (A), (B), (C) and (D) of that section are imported into Article 58. The parenthetical clause which reads "(relating to the period for which property has been held)" is obviously for the sole purpose of more particularly identifying and describing the reference to Section 101(c)(8).

Of these rules of tacking only paragraph (B) has any relevancy. Article 58 of the Regulations, when read in conjunction with that paragraph, requires that when shares are obtained by a taxpayer from any other person under circumstances in which the taxpayer is obliged to use the basis of the other person under Section 113, such shares must be deemed to have been "purchased" on the date as of which that basis is fixed.

The obvious purpose of the adoption of these rules of tacking was to bring the "first in, first out" rule into harmony with the "basis" provisions of Section 113. *Cf. Richardson v. Smith*, D. C. Conn., September 13, 1938, not officially reported but set out in 1938 C. C. H. Federal Tax Service, Vol. 4, paragraph 9503, reversed on other grounds, 102 F. (2d) 697 (C. C. A. 2d, 1939).

If, as we have contended under the First Point above, the respondent Campbell's cost basis in the securities distributed to her by the testamentary trustees is fixed as of the date of that distribution, there is no occasion for applying paragraph (B) of the rules of tacking, and she must be deemed to have "purchased" the stock received from the

trustees on the date of such distribution. This being so, the stock purchased individually by Mrs. Campbell prior to the distribution to her of like shares from the trustees must be deemed to be the "first in" stock within the meaning of the rule and must be regarded as the first stock sold by her.

This construction of the "first in, first out" rule is practical and is in accord with the realities. The rule is a formula designed to facilitate the determination of gain or loss on the sale of securities where identification is impossible, by associating the sale price of particular shares with the purchase price of particular shares. Since the rule is intended to determine the order in which unidentifiable securities are sold, it should be construed as requiring that such securities are sold in the order in which they become available to the taxpayer for sale.

The intimation at pages 28 and 29 of the Commissioner's *Gambrill* Brief, Nos. 472-475, that his determination on this issue is the application of some established administrative rule in such situations is wholly gratuitous. He refers to no published ruling and we are confident that there is none. We do not question the validity of Article 58 of the Treasury Regulations. We deny, however, that every application of that Article by the Commissioner, however arbitrary, must be given weight as evidence of a long standing administrative practice. The "first in, first out" rule is not a creation of the Commissioner and did not have its genesis in the Treasury Regulations. It is an ancient rule having wide usage in other fields of the law. *Cf.* 3 *Scott on Trusts* (1939) §517. Its purpose is to provide a presumption of fact in the absence of proof of fact. Its application should bear some relation to fact and it may not be arbitrarily applied.

As already observed in other connections in this brief, Mrs. Campbell had no specific trust property which she had

obtained as her own as distinguished from her remainder interest. The trustees had a power of sale under the will (Campbell, No. 473, R. 98) which authorized them to dispose of any of the trust property in their hands. Indeed the decedent expressed the wish that at least fifty per cent of the trust estate should be sold and invested in legal investments within five years after his death (Campbell, No. 473, R. 98). The exercise of these powers was in no way dependent upon Mrs. Campbell's consent. In any realistic application of the "first in, first out" rule it is anomalous to say that the stock received by Mrs. Campbell from the trustees on July 10, 1928, was "first in" (taking priority over the shares purchased by her in 1926 and 1927), in the face of the fact that until July 10, 1928, she not only did not own the stock held in trust but might never receive it. In any view of the matter the "first in, first out" rule should be so applied as to hold that the securities purchased individually by Mrs. Campbell in 1926 and 1927 must be deemed to be sold prior to the securities distributed to her by the trustees in 1928.

Conclusion

The decisions of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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ERNEST J. BROWN
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Counsel for Respondents

APPENDIX A

Statutes

Revenue Act of 1928:

SEC. 101. CAPITAL NET GAINS AND LOSSES.

* * * * * *

(b) Tax in case of capital net loss.—In the case of any taxpayer, other than a corporation, who for any taxable year sustains a capital net loss (as hereinafter defined in this section), there shall be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted, and the total tax shall be this amount minus 12½ per centum of the capital net loss; but in no case shall the tax of a taxpayer who has sustained a capital net loss be less than the tax computed without regard to the provisions of this section.

(c) Definitions.—For the purposes of this title—

* * * * * *

(2) "Capital loss" means deductible loss resulting from the sale or exchange of capital assets.

* * * * * *

(8) "Capital assets" means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. For the purposes of this definition—

* * * * * *

(B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the

provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

Revenue Act of 1928:

Sec. 113. Basis for Determining Gain or Loss.

(a) Property acquired after February 28, 1913.—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

• • •

(5) Property Transmitted at Death.—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair

Revenue Act of 1932:

Sec. 113. Adjusted Basis for Determining Gain or Loss.

(a) Basis (unadjusted) of property.—The basis of property shall be the cost of such property; except that—

• • •

(5) Property Transmitted at Death.—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the

market value of the property at the time of the distribution to the taxpayer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death;

fair market value of the property at the time of the distribution to the taxpayer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death.

Revenue Act of 1928:

Sec. 701. Definitions.

(a) When used in this Act—

(1) The term "person" means an individual, a trust or estate, a partnership, or a corporation,

* * *

(13) The term "taxpayer" means any person subject to a tax imposed by this Act.

Revenue Act of 1932:

Sec. 1111. Definitions.

(a) When used in this Act—

(1) The term "person" means an individual, a trust or estate, a partnership, or a corporation.

* * *

(14) The term "taxpayer" means any person subject to a tax imposed by this Act.

Regulations

Treasury Regulations 77 under the Revenue Act of 1932:

Art. 58. Sale of stock and rights.—When shares of stock in a corporation are sold from lots purchased

at different dates or at different prices and the identity of the lots can not be determined, the stock sold shall be charged against the earliest purchases of such stock. In the determination of the earliest purchases of stock the rules prescribed in subparagraphs (A), (B), (C), and (D) of section 101(c) (8) (relating to the period for which property has been held) shall be applied. The excess of the amount realized on the sale over the cost or other basis of the stock will constitute gain. • • •

Committee Reports

Revenue Act of 1928

The Report of the Joint Committee on Internal Revenue Taxation, H. R. Doc. No. 139, 70th Cong., 1st Sess. (1927), in so far as material, states (p. 17):

Basis for Gain or Loss on Sales by an Executor

Until recently gain or loss on an executor's sale was measured by the value at the decedent's death of what was sold. As a result of the decision by the Court of Claims in McKinney v. United States, and the denial of certiorari by the United States Supreme Court, the rule was changed so as to provide that gain or loss on such a sale would be measured as though the decedent had sold the property during his life.

The rule of the McKinney case is inconvenient, for it is often impossible to determine the decedent's cost or other basis. Moreover, as a practical matter, it results in taxing the value of bequests, devises, and inheritances as income. The old rule seems preferable, and it is recommended that it be set forth in the statute.

Section 204(a)(5) prescribes the basis when the beneficiary sells the property as the value at the time of "acquisition." Some doubt has arisen as to what is meant by the date of acquisition. The "date of death" is recommended to make the basis certain and definite.

The material portion of the Report of the House Committee on Ways and Means, H. R. Rep. No. 2, 70th Cong., 1st

Sess. (1928) 18, is set forth in full at pp. 10-11 of this brief.

The Report of the Senate Committee on Finance, Sen. Rep. No. 960, 70th Cong., 1st Sess. (1928), in so far as material, states (p. 26):

Sec. 113.—Basis for Determining Gain or Loss—Executors' Sale

The decision by the Court of Claims in McKinney v. United States has caused confusion in the existing law as to the basis on which an executor must determine gain or loss on the sale by him of property of the estate. The House bill in section 113(a)(5) provides that in such cases the basis shall be the fair market value of the property at the time of the death of the decedent. In the same section the House bill provides the same basis shall be used where the property is sold by the beneficiary.

It appears that the House bill is inadequate to take care of a number of situations which frequently arise. For example, the executor, pursuant to the terms of the will, may purchase property and distribute it to the beneficiaries, in which case it is impossible to use the value at the decedent's death as the basis for determining subsequent gain or loss, for the decedent never owned the property. Moreover, the fair market value of the property at the decedent's death can not properly be used as the basis, in the case of property transferred in contemplation of death where the donee sells the property while the donor is living.

Accordingly, the committee has revised section 113(a)(5) and certain related sections, so as to provide that in the case of a specific bequest of personalty or a general or specific devise of realty, or the transmission of realty by intestacy, the basis shall be the fair market value at the time of the death of the decedent. In these cases it may be said, as a matter of substance, that the property for all practical purposes vests in the beneficiary immediately upon the decedent's death, and therefore the value at the date of death is a proper basis for the determination of gain or loss to the bene-

ficiary. The same rule is applied to real and personal property transmitted by the decedent, where the sale is made by the executor. In all other cases the basis is the fair market value of the property at the time of the distribution to the taxpayer. The latter rule would obtain, for example, in the case of personal property not transmitted to the beneficiary by specific bequest, but by general bequest or by intestacy. It would also apply in cases where the executor purchases property and distributes it to the beneficiary.

Section 113(a)(4) is amended so as to provide that the basis in the case of property passing under power of appointment, regardless of the time of acquisition, shall be the fair market value on the date of acquisition, which is the rule of the present law and of the House bill.

Section 113(a)(3) is amended by striking out the last sentence of the House bill, with the effect of including within the paragraph all classes of transfers in trust made after December 31, 1920 (even if made in contemplation of death or to take effect in possession or enjoyment at or after death). The basis thus provided is the basis the property would have in the hands of the grantor, adjusted for gain or loss recognized to the grantor when the transfer was made.

The effect of striking out the last sentence of section 113(a)(3) is also to make the basis in the case of gifts in contemplation of death or to take effect in possession or enjoyment at or after death, if made after December 31, 1920, the same as the basis which the property would have in the hands of the donor or the last preceding owner by whom it was not acquired by gift.

The Report of the Committee of Conference on the Revenue Act of 1928, H. R. Rep. No. 1882, 70th Cong., 1st Sess. (1928), in so far as material, states (pp. 14, 15):

Section 113(a)(5) is amended (No. 75) so as to provide that in the case of specific bequest of personalty or a general or specific devise of realty or the transmission of realty by intestacy the basis shall be the fair market value of the property at the time of the death of the decedent. In these cases it may be said, as a matter of substance, that the property for all practical pur-

poses vests in the beneficiary immediately upon the decedent's death, and therefore the value at the date of death is a proper basis for the determination of gain or loss to the beneficiary. The same rule is applied to real and personal property transmitted by the decedent where the sale is made by the executor. In all other cases the basis is the fair market value of the property at the time of the distribution to the taxpayer. The latter rule would obtain, for example, in the case of personal property not transmitted to the beneficiary by specific bequest, but by general bequest or by intestacy. It would also apply in cases where the executor purchases property and distributes it to the beneficiary; and the House recedes, with the following amendment:

A special rule is provided in section 113(a)(5) by which to determine the basis of property transferred in trust with the right reserved to the grantor at all times prior to his death to revoke the trust where the sale or other disposition of property occurs after the death of the grantor. This rule includes sales or other dispositions by the trustee and also by a beneficiary of the trust. In view of the complete right of revocation in such cases on the part of the grantor at all times between the date of creation of the trust and his death, it is proper to view the property for all practical purposes as belonging to the grantor rather than the beneficiaries and to treat the property as vesting in the beneficiaries according to the terms of the trust instrument, not at the date of creation of the trust, but rather on the date of the grantor's death, for the purpose of determining gain or loss on sale or other disposition of the property after the grantor's death by the trustee or by a beneficiary. Accordingly, it is provided that the basis of such property in the hands of the persons entitled thereto by the terms of the trust instrument after the grantor's death shall be the same as if the trust instrument had been a will executed on the date of his death. Thus property acquired by virtue of revocable trusts of the kind described is treated, for all practical purposes, the same as though it had been transmitted by the grantor by will at his death.

APPENDIX B

Chronological History of the Revenue Acts Relating to the Basis of Property Acquired by Inheritance and Gift

The first statutory provision for determining the basis for gain or loss on the sale of property appeared in the Revenue Act of 1918 as Section 202(a), and provided simply that the basis for property acquired after March 1, 1913, was "the cost thereof." Treasury Regulations 45, Article 1562, promulgated under this Act, provided that as to property acquired by bequest, devise or descent, the basis was the value at the time of acquisition.

In 1920 the Bureau of Internal Revenue ruled that under the Revenue Act of 1918, where personal property was acquired by a remainderman having only a contingent interest prior to the death of the life tenant, the basis for gain or loss on the sale of such property by the remainderman was its value at the date of the death of the life tenant. O. D. 727, 3 Cum. Bull. 53 (1920). At the same time in related rulings the Bureau ruled that where the interests of remaindermen vested in right at the date of death of the decedent, the basis of property sold by them was the value at the time of the vesting of their interests or the March 1, 1913 value if the interests vested prior thereto. Sol. Op. 35, 3 Cum. Bull. 50 (1920) (overruling Law Opinion 649); O. D. 694, 3 Cum. Bull. 53 (1920). It also ruled that property acquired by residuary bequest should have as a basis its value as of the date of death of the decedent. O. D. 667, 3 Cum. Bull. 52 (1920).

The Revenue Act of 1921, effective November 23, 1921, contained the first express provision for the basis of property acquired by inheritance. In Section 202(a)(3) it provided that the basis of "property acquired by bequest, devise, or inheritance" should be the value of the property

"at the time of such acquisition." The Committee reports state that the existing law with respect to such property was in substance preserved. H. R. Rep. No. 350, 67th Cong., 1st Sess. (1921) 9, 1939-1 Cum. Bull. (Part 2) 168, 175; Sen. Rep. No. 275, 67th Cong., 1st Sess. (1921) 10, 1939-1 Cum. Bull. (Part 2) 181, 188.

In 1922 and 1923 the Bureau of Internal Revenue again ruled that the basis on the sale of property by the remainderman of a testamentary trust was the time when the remainder vested in right. I. T. 1622, II-1 Cum. Bull. 135 (1923); I. T. 1165, I-1 Cum. Bull. 30 (1922).

Under the Revenue Act of 1924 the provision as to the basis for property acquired by inheritance found in the 1921 Act was reenacted in substantially identical form. Revenue Act of 1924, Section 204(a) (5).

The first decision under these basis provisions came in the case of *F. W. Matthiessen, Jr.*, 2 B. T. A. 921 (1925). *Cf. F. W. Matthiessen, Jr., v. United States*, 65 Ct. Cl. 484 (1928). In this case the Board had before it the question of the basis under the 1918 Act of securities sold by a residuary legatee. It held that the time of acquisition of the securities, and hence the basis, was the time of the delivery of the securities to the legatee and not the date of the death of the decedent.

The Revenue Act of 1926, Section 204(a) (5), reenacted in identical form Section 204(a) (5) of the 1924 Act, and thereby continued in force value at the date of acquisition as the basis of property acquired by inheritance.

Later in 1926 the Court of Claims in the case of *McKinney v. United States*, 62 Ct. Cl. 180, held that under the 1918 Act the basis for securities sold by an executor was the basis of the securities to the decedent and not the value of the securities at the date of death. The General Counsel of the Bureau of Internal Revenue thereafter issued a rul-

ing holding in accordance with the *McKinney* case on the same facts but under the 1921 Act. G. C. M. 2705, VI-2 Cum. Bull. 174 (1927).

During 1925, 1926 and 1927 the Bureau of Internal Revenue issued a number of rulings under the 1924 and 1926 Acts, which stated or indicated that in accordance with prior rulings the basis for the sale of property by the remainderman of a trust was the value at the time the interest vested. S. M. 3781, IV-2 Cum. Bull. 21 (1925); S. M. 4640, V-1 Cum. Bull. 60 (1926); I. T. 2379, VI-2 Cum. Bull. 116 (1927).

In 1927 the Board of Tax Appeals in *Alice Fisher Foster*, 7 B. T. A. 1137, and the District Court for the Western District of New York in *Brewster v. Gage*, 25 F. (2d) 915, followed the *Matthiessen* case, *supra*, and held that the basis for securities sold by a residuary legatee was the value at the time of delivery to him and not the value at the date of the death of the decedent. The 1918 and 1921 Acts were involved in these cases.

This, then, was the situation at the time the Revenue Act of 1928 came under consideration. The values on several dates were held to be the bases for gain or loss, the use of each depending upon the fact situation involved. The Treasury had consistently held that the basis for property sold by the remainderman of a testamentary trust turned upon whether the remainder was vested or contingent and was the value of the property at the time the remainder vested. As to property sold by an executor the Bureau had first ruled that the basis was the value at the date of death but after the holding in the *McKinney* case had ruled in accordance with that case that the basis was the same as the decedent's basis. As to property sold by a residuary legatee, the Bureau had consistently ruled that the basis was the value at the date of death. The few decisions of

the Board and Courts on this point, however, were to the contrary.

The immediate legislative history of the enactment of Section 113(a) (5) of the Revenue Act of 1928 has been set forth in detail in this brief, *supra*, pp. 9-13.

The Revenue Act of 1932 reenacted Section 113(a) (5) of the Revenue Act of 1928 in identical form. The Committee reports on the 1932 Act make no mention of this Section.

Brewster v. Gage, 280 U. S. 327, decided in 1930, is the first decision by this Court on the basis of property acquired by inheritance. In this case the Court affirmed the Circuit Court of Appeals for the Second Circuit which had reversed the District Court decision previously mentioned (*supra*, p. x). It held that under the 1918 and 1921 Acts fixing the basis at the date of acquisition, the basis for securities sold by a residuary legatee was the value at the date of the decedent's death. The taxpayer there argued that the 1928 Act expressed the meaning of the earlier Acts. The Court rejected this argument and said (p. 337):

> "The Revenue Act of 1928, §113(a) (5), expressly established value at the time of the death of the decedent as the basis of calculation in respect of sales of personal property acquired by specific bequest and of real estate acquired by general or specific devise or by intestacy, and in all other cases fixed fair market value at the time of distribution to the taxpayer as the basis. 45 Stat. 819 (26 USCA §2113). The deliberate selection of language so differing from that used in the earlier acts indicates that a change of law was intended. Ordinarily, statutes establish rules for the future, and they will not be applied retrospectively unless that purpose plainly appears. United States v. Magnolia Co., 276 U. S. 160, 162, 48 S. Ct. 236, 72 L. Ed. 509, and cases cited. There is no support for the suggestion that subdivision (5) expressed the meaning, or was intended to govern or affect the construction, of the earlier statutes."

After the decision of this Court in *Brewster v. Gage* a considerable body of cases arising under various Revenue Acts from that of 1918 to that of 1926, and as to realty under the 1928 and 1932 Acts was decided by Circuit Courts of Appeals.[18] In all of these cases the Courts held that the test of the basis of property sold by the remainderman of a testamentary trust was whether the remainder interest was contingent or vested and that the basis was the value of the property at the time the remainder vested in interest.

The administrative rulings on Section 113(a) (5) of the Revenue Acts of 1928 and 1932 have been inconsistent.[19] The decisions of the Courts and the Board of Tax Appeals on Section 113 (a) (5) of the 1928 and 1932 Acts are set forth in this brief, *supra*, pp. 7, 8.

In the Revenue Act of 1934 Section 113 (a) (5) was again changed and Congress returned to the basis fixed in the 1926 and preceding Acts, *i. e.*, the time of acquisition of the property. The Revenue Acts following the 1934 Act and the Internal Revenue Code have retained the form of the 1934 Act.

The Committee reports on the 1934 Act [illegible] at length the reason for the return in that Act to [illegible] date of acquisition basis. The House Ways and Means Committee report states that the 1928 and 1932 Acts had permitted evasion of taxes where an executor and testamentary trustee were the same person and that doubt as to the meaning of the term "date of acquisition" had been eliminated, citing *Brewster v. Gage*, 280 U. S. 327 (1930), *supra*. H.

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[18] These cases are listed at pages 7, 46 of this brief in footnotes (1) (14) and (15).

[19] G. C. M. 6195, VIII-1 Cum. Bull. 99 (1929); G. C. M. 6811, IX-1 Cum. Bull. 136 (1930); I. T. 2539, IX-1 Cum. Bull. 139 (1930); G. C. M. 10260, XI-1 Cum. Bull. 79 (1932); G. C. M. 11309, XII-1 Cum. Bull. 126 (1933); G. C. M. 14893, XIV-1 Cum. Bull. 202 (1935).

R. Rep. No. 704, 73d Cong., 2d Sess. (1934) 27, 28, 1939-1 Cum. Bull. (Part 2) 554, 574. The Senate Finance report in the main simply repeats the language of the House Committee report. Sen. Rep. No. 558, 73d Cong., 2d Sess. (1934) 34, 1939-1 Cum. Bull. (Part 2) 586, 612.

After the enactment of the Revenue Act of 1934 the Treasury issued Regulations 86 under the 1934 Act which provided in Article 113(a) (5)-1 that the basis in all cases should be the value at the date of death. This Article has been retained in substantially identical form as Article 113 (a) (5)-1 of Regulations 94, under the 1936 Act, and of Regulations 101, under the 1938 Act, and as Section 19.113 (a) (5)-1 of Regulations 103, under the Internal Revenue Code. The decisions of the Courts on the validity of this regulation are listed and discussed at pp. 30, 31, 47, 48 of this brief.

Beginning with Treasury Regulations 45 promulgated under the Revenue Act of 1918 and continuing through to the present Treasury Regulations 103 under the Internal Revenue Code, the Regulations under the section of the statute dealing with the basis of property acquired by inheritance have contained the following sentence in practically identical form:

> "* * * For the purpose of determining the profit or loss from the sale of property acquired by bequest, devise, or descent since February 28, 1913, its value as appraised for the purpose of the federal estate tax, or in the case of estates not subject to that tax its value as appraised in the State court for the purpose of State inheritance taxes, should be deemed to be its fair market value when acquired. * * *"

(Treasury Regulations 45, Article 1562)

Treasury Regulations 33 (revised edition), paragraph 44, contained approximately the same provision in less complete form.

In the Regulations under the Revenue Acts prior to th 1928 Act this sentence was primarily an appraisal pro vision, defining the method for determining fair marke value in fact situations where it is otherwise found to b applicable. The sentence was retained solely as a method of-evaluation provision under the 1928 and subsequen Revenue Acts and the Internal Revenue Code. It appear in Article 596 of Regulations 74 and 77 under the 1928 an 1932 Acts and as a separate subsection, Article 113 (a) (5)-1 (c) of Regulations 86, 94 and 101 and Section 19.11 (a) (5)-1 (c) of Regulations 103, under the Revenue Act of 1934, 1936 and 1938 and the Internal Revenue Code.

Prior to the Revenue Act of 1921 the Revenue Acts had made no special provision for the basis of property ac quired by gift. The general rule of the cost of the property contained in Section 202(a) (2) of the 1918 Act was that applicable. Article 1562 of Treasury Regulations 45, under the 1918 Act, however, provided that the basis of property acquired by gift was the value at the date of acquisition. See also Treasury Regulations 33 (revised), Article 4, par 41, under the 1916 Act.

In the 1921 Act Congress provided that if property was acquired by gift after December 31, 1920, the basis was the same as in the hands of the donor or the last preceding owner by whom the property was not acquired by gift. If the property was acquired by gift prior to December 31, 1920, the basis was the value at the time of such acquisition. Revenue Act of 1921, Section 202(a) (2). The Committee reports state that this special provision was enacted to prevent tax evasion. H. R. Rep. No. 350, 67th Cong., 1st Sess. (1921) 9, 1939-1 Cum. Bull. (Part 2) 168, 175.

In the Revenue Act of 1924 similar provisions were enacted as Section 204(a) (3) and part of Section 204(a) (4), dealing with property acquired through an *inter vivos*

trust. These provisions were necessary since *inter vivos* trusts had not been included within the general provision for gifts. H. R. Rep. No. 179, 68th Cong., 1st Sess. (1924) 16, 1939-1 Cum. Bull. (Part 2) 241, 253; *Edward T. Bedford Trust,* 42 B. T. A. 748 (1940).

These provisions were continued in substantially identical form as Section 204(a) (2), (3) and (4) of the Revenue Act of 1926 and as Section 113(a) (2), (3) and (4) of the 1928 and 1932 Acts. In the 1934 Act Section 113(a) (2) was amended to provide that as to property acquired by gift after December 31, 1920, the basis should be the basis in the hands of the donor or the last preceding owner by whom the property was not acquired by gift, except that for the purpose of determining loss the basis should be the basis so determined or value of the property at the time of gift, whichever is lower. As a result of this last limitation, if the donee has a loss with reference to the donor's cost, but the sale price is greater than the value of the property at the time of the gift, neither gain nor loss is recognized. (Example: Donor's cost, $150; Value at time of gift, $100; Donee's sale price, $125; Result, no gain or loss.) Subsequent Revenue Acts and the Internal Revenue Code retained the gift sections in the form of the 1934 Act.

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No. 472.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

GUY T. HELVERING, Commissioner of Internal Revenue,

Petitioner,

v.

RICHARD VAN NEST GAMBRILL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR REHEARING.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR REHEARING.

The respondent Richard Van Nest Gambrill hereby respectfully petitions this Honorable Court for rehearing and reconsideration of the decision in this cause announced on March 31, 1941.

The issues involved in this cause are substantially the same as those involved in *Helvering* v. *Campbell*, *Helvering* v. *Knox* and *Helvering* v. *Rogers*, Nos. 473, 474 and 475 present Term. In this Court the hearing in those cases was had immediately following the hearing in the present case, and the opinions in all four cases were filed on the same date. In the Circuit Court of Appeals for the Second Circuit all four cases were the subject of a single opinion.

There is now being filed in this Court a petition for rehearing in the *Campbell, Knox* and *Rogers* cases which sets forth reasons and arguments for reconsideration of the decisions in those cases. The reasons and arguments set forth in that petition are equally applicable to the decision in the present case. In order to conserve the time of this Court those reasons and arguments are not repeated here, but are in substance incorporated herein by reference.

WHEREFORE, upon the grounds set forth in the above-described petition for rehearing in said related cases, the respondent in this cause respectfully requests this Honorable Court for rehearing and reconsideration of its opinion and decision in this cause.

Respectfully submitted,

SIDNEY W. DAVIDSON,
ALLIN H. PIERCE,
Counsel for the Respondent.

Dated, New York, New York, April 24, 1941.

Certificate of Counsel.

I, ALLIN H. PIERCE, counsel for Richard Van Nest Gambrill, the respondent in the above-entitled cause, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

ALLIN H. PIERCE.

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Nos. 473, 474, 475

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 473

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,
v.
MARJORIE K. CAMPBELL

No. 474

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,
v.
SEYMOUR H. KNOX

No. 475

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,
v.
DOROTHY K. G. ROGERS

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

DANIEL J. KENEFICK
JOHN L. KENEFICK
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DOROTHY K. G. ROGERS

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

The respondents in the above entitled cases hereby respectfully petition this Court for rehearing and recon-

sideration of its decisions in these cases announced on March 31, 1941. Fully aware that such action by this Court is rare, they nevertheless feel that it is warranted, if not required herein, in order that the questions presented may have more careful consideration.

This petition is believed meritorious for the following reasons, summarily stated:

1. The Court's own language indicates the erroneous nature of the result reached.

2. The Court has apparently given no consideration to the majority of its own previous decisions herein relevant,[1] and has misread the one decision which it did consider.[2]

3. The Court has apparently given little consideration to the clear language of the statute, or to the statutory structure into which these decisions must somehow be fitted.

4. The Court has misread the legislative history of the statutory provisions involved.

5. While Revenue Acts are probably to be construed in the light of their predominant purpose to produce revenue, this affords little trustworthy light for the reading of statutory provisions as to cost bases, where the result, applied to varying cases, may sometimes help and as often hurt the public revenues; it certainly affords a questionable basis for decision in any given case.

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[1] Anderson v. Wilson, 289 U. S. 20 (1933); Helvering v. San Joaquin Fruit & Investment Co., 297 U. S. 496 (1936); Lyeth v. Hoey, 305 U. S. 188 (1938); Hartley v. Commissioner, 295 U. S. 216 (1935).

[2] Brewster v. Gage, 280 U. S. 327 (1930).

Argument

The fundamental question in these cases is the basis issue. With this issue decided in favor of the Commissioner, the results on the "period of holding" and "first in, first out" questions, follow automatically by virtue of the tacking provisions of Section 101(c)(8)(B) and Article 58 of Regulations 77, the validity of which was not challenged by the respondents. The Court's rather lengthy consideration of these questions in the *Gambrill, Campbell, Knox* and *Rogers* cases, after a decision in favor of the Commissioner on the "basis" issue is perhaps to be regarded somewhat as a work of supererogation, since no substantial question was presented with respect to these issues except in the event of a decision favorable to the taxpayers on the "basis" issue. We therefore confine ourselves herein to a consideration of the "basis" issue. Should the Court reconsider and reverse its decision on that question, the arguments presented in our brief on the latter questions would then become relevant and material, and, we believe, conclusive.

The Court's decision on the "basis" issue was set forth in its opinion in *Maguire v. Commissioner*, No. 346, argued immediately preceding these cases, and decided at the same time. Since the facts in all the cases, so far as they concern the "basis" issue, are analogous except as to the character of the remainders, we here deal, for the purpose of clarity, with the facts and opinion as set forth in the *Maguire* case.

A. Property Owned by the Decedent.

The Court's own statement of the basic facts and the question presented, when compared with the statute, gives

a clear answer to the question with respect to property owned by the decedent at his death. The first sentence of the Court's opinion reads: "The taxpayer's share of a testamentary trust, established pursuant to the will of her father, was delivered to her in kind in 1923." These are the essential facts, and the pertinent section of the statute, phrased in almost the same words furnishes the clear and obvious answer: "In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer." That "delivery" and "distribution" as here used are synonymous has not been questioned either by the Commissioner or by the Court. Comparing the facts as stated by the Court, and the statute, the conclusion seems inescapable that value as of the time of distribution to the taxpayer, which the Court says is in 1923, shall establish the cost basis.

So it is with the Court's statement of the first question, *i. e.* "(1) whether the basis in case of the personalty owned by decedent is its value when received by the trustees from the executors or its value at the date of delivery by the trustees to the taxpayer." The statute furnishes a clear answer in words which almost echo the latter words of the Court's statement: "In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer."

If it were doubtful, the Court's own language makes it clear that the individual respondents here are "the taxpayers." The statute provides that in these cases basis shall be the market value of property when distributed "to the taxpayer." The Court's avoidance of the obvious and,

we believe, necessary conclusion involves a reading out of the statute of the vital last three words, "to the taxpayer."[3]

Distribution of property to the trustee is not distribution of property to the taxpayer where the taxpayer is the beneficiary of the trust. Whatever talk may be indulged in about equitable estates,[4] the fact remains that the time of distribution of property to the taxpayer is the time of distribution of property to the taxpayer, and not the time of distribution of property to some other person. Since *Anderson v. Wilson,* 289 U. S. 20 (1933), which the Court's opinion does not mention, it has never been imagined that under the scheme of the Revenue Acts a trustee and a beneficiary were the same person or the same taxpayer. So long as Congress retains the statutory scheme embodied in Supplement E (Sections 161-169) of the Revenue Acts, it seems to be required of the Courts that they shall respect the clearly stated Congressional plan to treat them as separate.

Not only does the Court's opinion remove the phrase "to the taxpayer" from the statute, it also distorts the words "property" and "distribution." When property—real estate, securities, second hand books or whatever—is sold or exchanged, the statute (Sections 22(a), 22(f) and 111) provides that gain or loss shall be recognized. That gain or loss is measured by the difference between the basis of that property established by Section 113 and the amount realized upon the sale or exchange of the same property.

[3] It is perhaps significant that though the government's briefs in tax cases customarily refer to the litigant opposing the Commissioner as "the taxpayer," such reference is studiously avoided in these cases.

[4] Cf. Helvering v. San Joaquin Fruit & Investment Co., 297 U. S. 496 (1936).

If the beneficiary of a testamentary trust sold his remainder interest, that would produce gain or loss measured by the basis of that remainder interest. But where, as here, specific and identified securities are sold, gain or loss is measured by the basis of those securities—or so the statute provides. To treat the two—the specific property and the remainder interest—as the same, as the Court has done, can arise from, and produce nothing but, complete confusion—a confusion, we may say, which once existed and which was eliminated only after extensive administrative probing of the field. See G. C. M. 19884, 1938-1 Cum. Bull. 290, and cases cited therein[5]. The Court holds that distribution to a trustee is distribution to the taxpayer because the taxpayer then acquires an equitable estate in the property, and says that it is immaterial that legal title and possession may not be transferred to him until years later. To this there are two obvious objections in addition to those pointed out above. In the first place, "distribution" is a totally inappropriate word with reference to the coming into being of an equitable estate, and it was not an equitable estate which was here sold. The statute, in so far as it deals with property acquired by general bequest, makes vital the time when the specific property later sold was *distributed* to the taxpayer who sold it, not the time when he acquires some equitable interest. And to say, as the Court has done in support of its conclusion—and this is the second objection—that the equitable estate arises when property is transferred from executor to testamentary trustee, is at best a somewhat dubious statement.

[5] It is worth noting that the Commissioner in his Maguire brief (No. 346, p. 27) was careful to urge that the basis provisions of the statute "are concerned with the particular property sold" and to point out that the "particular property" must be carefully distinguished from "the interest or estate of which the specific property sold was a part." Thus, as to this the Court's opinion runs counter to the contentions of both parties.

Most careful students would agree that the equitable estate of the remainderman of a testamentary trust—or more accurately, his future interest—arises upon the death of the testator. Indeed, this Court itself has, rather inconsistently, twice so stated in its discussion of the succeeding issues in the *Gambrill* and *Campbell* cases. Therefore, the argument that distribution of property to the taxpayer occurs when the equitable estate in the taxpayer comes into being, proves too much. If the Court's reasoning were correct, the cost basis would be established by value at the date of death. But no one thus far has, expressed—or well could express—any idea that the 1928 and 1932 Acts so provide with respect to property other than realty and personal property specifically bequeathed.

In support of its conclusion the Court summons the decision in *Brewster v. Gage*, 280 U. S. 327 (1930). But the Court's discussion of that case indicates a rather surprising unawareness of the grounds of its decision. Under the Revenue Act of 1926 and other statutes prior to the Revenue Act of 1928, it had been provided: "If the property was acquired by bequest, devise, or inheritance, the basis shall be the fair market value of such property at the time of acquisition." In *Brewster v. Gage*, a case arising under the earlier statute, the Court pointed out that real property and specific bequests were clearly acquired at the death of the decedent and should therefore take a cost basis of value at that time. It added that there was nothing to indicate that other property acquired from a decedent should be treated differently, and that Congress had presumably intended uniformity rather than diversity of treatment. It was argued by the taxpayer in *Brewster v. Gage* that the 1928 Act was—as this Court says—"designed to clarify" the earlier statutes, and that

the clear provision for diversity of treatment of real property and specific bequests on the one hand and general bequests on the other in the 1928 statute should be imputed to the earlier statutes. But in *Brewster v. Gage* the Court, referring to the 1928 statute, rejected this argument, saying, "The deliberate selection of language so differing from that used in the earlier Acts indicates that a change of law was intended." 280 U. S. 327, 337. Now the Court refers to *Brewster v. Gage* as authority for seeking a degree of pseudo-uniformity[6] under the 1928 Act in order to bring it as closely as possible within the pattern of earlier Acts. Reasoning so circuitous as this certainly deserves, if it does not require, reconsideration.

The Court's discussion of the legislative history of the 1928 statute seems equally uncomprehending. In the face of the clear dichotomy provided for in the 1928 Act, the Court minimizes the departure from the uniformity of 1926 and earlier statutes, and says that the difference between the final Senate form of the 1928 statute and the original House form was designed only to avoid confusion. "To be sure," states the opinion, "it did produce a limited deviation * * *." Regardless of purpose and

[6] It cannot be uniformity since the statute specifically provides that on the one hand real property and property acquired by specific bequest shall have a basis of value at the date of death while, on the other hand, "in all other cases . . . the basis shall be the fair market value of the property at the time of the distribution to the taxpayer." Indeed, it seems strange, in view of this clear differentiation in the statute to find this Court stating as a ground for rejection of the respondents' position, that it would produce "a substantial disparity between the treatment of remaindermen of realty and remaindermen of personalty under the same testamentary trust." Meanwhile the Court apparently finds no cause for concern with the disparity which its decision creates between remaindermen of a testamentary trust and remaindermen of inter vivos trusts of a class to which the last sentence of Section 113(a)(5) relates.

characterization, the deviation exists. The House bill provided for a uniform value-at-death rule as the basis of all property acquired by will or intestacy; the Senate bill provided the value-at-death basis only for real property and property acquired by specific bequest. "In all other cases," provided the Senate deviation which was enacted into law, "if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer." And all the taxpayers here seek is a recognition and enforcement of that statutory "deviation" giving them a cost basis in property equal to the value of the property at the time of the distribution of the property to them, the taxpayers.

B. Property Purchased by Testamentary Trustees.

The Court holds that property purchased by testamentary trustees and subsequently distributed to beneficiaries was not "property acquired by will" by the latter, and so was not subject to the provisions of Section 113(a)(5). At the same time the Court holds, as the government concedes, that property purchased by executors and distributed was "property acquired by will" and subject to Section 113(a)(5). There is no rational basis, we believe, for saying that property purchased by an executor is acquired by will and that property purchased by a testamentary trustee is not.

The Court relies upon the title of Section 113(a)(5), "Property Transmitted at Death." We have shown in our brief that this title, applied to the section in its final form, was accidental and anomalous. It was appropriate to the House bill in which it was written; it had no rele-

vance after the Senate changes were made. But even passing this clear bit of history, and taking significance from the title, the section is then as inappropriate to property purchased by executors as it is to property purchased by testamentary trustees. Neither is transmitted at death.

The Court says that the Senate report specifically stated that Section 113(a)(5) governed purchases by executors, and made no reference to purchases by testamentary trustees. Without commenting on the intimated necessity of a Committee report being encyclopedic, it must be pointed out that the Court omits the telling phrase "For example," used in the Report to illustrate the working of a statutory provision applicable "In all other cases . . . ."

The Court does not mention *Lyeth v. Hoey*, 305 U. S. 188 (1938), and *Hartley v. Commissioner*, 295 U. S. 216 (1935). Yet its decision is inconsistent with the reasoning of the former. And in giving one taxpayer (beneficiary) another taxpayer's (trustee's) cost basis in property without statutory sanction, the Court substantially overrules the latter case. In reasoning from what the trustee's cost basis would have been had it sold the property, the Court indicates either unfamiliarity with the *Hartley* case or an unspoken intention to overrule it, which latter alternative can hardly be presumed. We believe that under such circumstances these cases deserve more complete consideration than the Court's opinion evidences.

C. The Statute.

In several places in its opinion the Court has stated that a decision contrary to that reached by it would open an avenue for tax avoidance. This statement, made originally

by the Commissioner, we believe we have shown in our brief to be an assumption without factual basis. Some avoidance might have been possible whatever the result of these cases, but we believe we have shown that the preponderance lies in the other direction. But if we are wrong on this, a larger question is presented.

We believe that the language of Section 113(a)(5) of the Revenue Acts of 1928 and 1932 is clear. At all events the result reached in these cases can be attained only by eliminating some of the particularly significant words and phrases which Congress chose to put into that section. Whatever the result of taking the whole section, that is what Congress enacted. And while the Courts should undoubtedly in difficult cases read the Revenue Acts in the light of their "general object to put money into the federal treasury" *(Helvering v. Stockholms Enskilda Bank,* 293 U. S. 84, 89 (1934)), that principle, if carried too far or applied as the ultimate determinant in the decision of cases, brings into play for the consideration of the Court those fundamental factors which, in another connection, were set forth by Mr. Justice Stone dissenting in *United States v. Butler,* 297 U. S. 1, 78-79 (1936).

This petition for rehearing is submitted in the firm conviction that it is meritorious, and the undersigned certify that it is presented in good faith and not for purposes of delay. If, in it, we have been frank in indicating that we believe the Court's opinion to be not well considered and logically unsupportable, those statements are made not with lack of respect for the Court, but in the belief that consistent

with our professional obligations we could in this case do no less.

Dated: April 24, 1941.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 472.—October Term, 1940.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, *vs.* Richard Van Nest Gambrill. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 31, 1941.]

Mr. Justice Douglas delivered the opinion of the Court.

The questions involved here are in part the same as those in *Maguire* v. *Commissioner*, No. 346, decided this day. Respondent was a remainderman under a trust created by the will of his grandmother[1] who died in 1897. The trust *res*, consisting of personalty, was delivered by the executors to themselves as trustees in 1898. The life beneficiary, respondent's mother, died in March, 1928. On May 5, 1928, the trustees delivered the corpus to respondent as remainderman. Some of the property was part of the original trust *res*, and some was purchased by the trustees both prior to and subsequent to March 1, 1913. During the year 1930 (in February, on May 6, and in June) respondent sold some of the property in each group. The Board of Tax Appeals (38 B. T. A. 981) and the Circuit Court of Appeals (112 F. (2d) 530) held: (1) that for the purpose of determining gain or loss on the sale of the property in question the basis to respondent by virtue of § 113(a)(5) of the Revenue Act of 1928 (45 Stat. 791) was the fair market value of the property on the date when the corpus was

[1] Respondent was the sole surviving issue of his mother, Anna Van Nest Gambrill, and took under the following provisions of his grandmother's will:

"Ninth. All the residue of my estate of every kind I give and devise as follows:

'One half thereof in equal shares to my daughters Mary Van Nest Jackson, Anna Van Nest Gambrill, and Jennie Van Nest Foster, and my granddaughter, Mary Alice Van Nest absolutely.

'The other half thereof in four equal shares to my executors, to hold the same in trust, one share for the benefit of each of the same four persons to wit my said three daughters and my said granddaughter and to receive the income and pay the same to her during her life with full power to invest and reinvest in their discretion without any limitation whatsoever and at her death to transfer and deliver the same as she if leaving issue shall by will direct or in the absence of such direction, to her issue equally, or if she shall leave no issue, then to the survivors of the said four persons to wit my said three daughters and my said granddaughter, and to the issue of any of the said four persons who may have died, the issue to take the share which the parent would have taken if living.'"

delivered to respondent; and (2) that the property sold in February, 1930 had not been held by the taxpayer for more than two years and was, therefore, not a capital asset within the meaning of § 101(c) of the 1928 Act, while that sold on May 6 and in June, 1930, had been held by respondent for more than two years and was therefore a capital asset.

The rulings on the first question were erroneous. For the reasons stated in *Maguire* v. *Commissioner, supra,* the basis under § 113(a)(5) for the property delivered to respondent by the testamentary trustees was its value when distributed by the executors to the trustees if the property was owned by the decedent at her death, and cost to the trustees if it was purchased by them.[2]

We also disagree with the disposition made of the second question. Capital gains or losses are defined as those resulting from sales or exchanges of capital assets. § 101(c)(1) and (2). Capital assets are defined (with exceptions not material here) as "property held by the taxpayer for more than two years." § 101(c)(8). And § 101(c)(8)(B) provides: "In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person."

We are of the view that under these provisions respondent's holding period dates from the decedent's death for property which she then owned and from the date of purchase for property purchased by the trustees. In *McFeely* v. *Commissioner,* 296 U. S. 102, this Court held that a legatee's holding period under § 101(c)(8) of the 1928 Act dated from the decedent's death for property owned by the decedent and distributed to the legatee by the

[2] It should, of course, be noted that § 113(b) provided:

"(b) Property acquired before March 1, 1913.—The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, shall be:

(1) the cost of such property (or, in the case of such property as is described in subsection (a)(1), (4), (5), or (12) of this section, the basis as therein provided), or

(2) the fair market value of such property as of March 1, 1913, whichever is greater. In determining the fair market value of stock in a corporation as of March 1, 1913, due regard shall be given to the fair market value of the assets of the corporation as of that date."

executors, in spite of the fact that the legatee's basis under § 113-(a)(5) was value at the time of distribution to him by the executors. The date of acquisition was held to be the date of death, regardless of the gap between that date and the date of distribution. And that result was reached even though some of the taxpayers involved were residuary legatees whose interests at date of death were not unconditional. The reasoning of that case plus § 101(c)(8)(B) make it plain that respondent's interest, albeit a remainder, was acquired at the date of decedent's death for property then owned and at the date of purchase for property purchased by the trustees. The continuity in his holding was not broken by the intervening trust. The formal constitution of that trust though of special significance under § 113(a)(5) (*Maguire* v. *Commissioner, supra*) did not change the basic quality of his property interest. And the fact that that interest did not ripen into full and complete ownership except by the passage of time or the occurrence of subsequent events is inconsequential. For § 101(c)(8)(B) provides, as we have seen, that in determining the taxpayer's holding period there shall be included the period for which the property was held by any other person if under § 113 the property had the same basis in whole or in part in the taxpayer's hands as it would have in the hands of the other person. It is plain that under § 113 the basis to the trustees was the same as the basis to the taxpayer. Hence the period of their holding is not to be excluded from the period of the taxpayer's holding. That makes plain that "property held by the taxpayer" as used in § 101(c)(8) embraces not only full ownership but also any interest whether vested, contingent, or conditional. Otherwise the period of the holding by trustees would not be included in the holding by a mere remainderman. Hence, as in *McFeely* v. *Commissioner, supra,* we look to the time when the taxpayer first acquired the interest which later ripened into full ownership. It is plain that for property owned by the decedent he acquired that interest at her death and that for property purchased by the trustees he acquired that interest at the date of purchase.

Reversed.

The CHIEF Justice and Mr. Justice ROBERTS think the judgment should be affirmed for the reasons stated by the court below, 112 F. (2d) 530.

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SUPREME COURT OF THE UNITED STATES.

Nos. 473, 474, 475.—October Term, 1940.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, 473 *vs.* Marjorie K. Campbell.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.
Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, 474 *vs.* Seymour H. Knox.	
Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, 475 *vs.* Dorothy K. G. Rogers.	

[March 31, 1941.]

Mr. Justice Douglas delivered the opinion of the Court.

The questions presented by these cases are in part related to, and in part the same as those involved in *Maguire* v. *Commissioner,* No. 346, and *Helvering* v. *Gambrill,* No. 472, decided this day.

The father of these respondents died in 1915. By his will it was provided that his residuary estate should be divided into four parts. One part was devised and bequeathed to trustees: "To receive, hold and, from time to time, invest and reinvest the same, and to collect the rents, income, issues, and profits on the property from time to time constituting such trust fund and to pay over so much of the net income arising therefrom, as to my said trustees shall seem wise and proper toward the support, maintenance, and education of my daughter, Marjorie Knox, until she shall arrive at the age of twenty-one (21) years, and to accumulate the balance of the income during her minority for her benefit, and to pay over the accumulated income to her when she shall arrive at the age of twenty-one (21) years and thereafter to pay over the entire net income to my said daughter, Marjorie Knox, until she shall arrive at the age of twenty-eight (28) years, at which time, I give, devise, and bequeath to my said daughter, Marjorie Knox, one-half (½) of the property then constituting said trust fund and I direct my said

trustees to pay over the net income on the remaining one-half (½) of said trust fund until she shall arrive at the age of thirty-five (35) years, at which time I give, devise, and bequeath the remaining part of said trust fund to my said daughter, Marjorie Knox, and to her heirs and assigns forever. In the event that my said daughter, Marjorie Knox, shall die before reaching the age of thirty-five (35) years, I give, devise, and bequeath any part or portion of said trust fund, which has not then been paid over to her, or to the possession of which at the time of her death she was not entitled, unto the issue of said Marjorie Knox, if any, surviving her, to be divided among them, share and share alike. And in case there be no issue her surviving, then I give, devise, and bequeath said trust fund unto her heirs."

Marjorie Knox is respondent Marjorie K. Campbell. Another part of the residuary estate was placed in trust for respondent Dorothy K. G. Rogers, under the same terms. And a third part together with certain securities was placed in trust for respondent Seymour H. Knox, under similar terms. He, however, was to receive $500,000 of the trust fund when he reached the age of twenty-five, one-half of the remaining trust fund when he became thirty, and the balance at thirty-five. Meanwhile, the income was payable to him. On July 1, 1921, the executors, pursuant to an order of the probate court, transferred the property to the trustees.

Marjorie K. Campbell attained the age of twenty-eight on July 10, 1928, and received at that time one-half of the property of her trust. Certain of the securities which she then received were sold by her during 1933 and certain of the bonds matured and were paid during 1933. Some of those securities had been held by her father at his death, others had been purchased by the executors, and some had been purchased by the trustees. In 1926 and 1927 she purchased stock of the F. W. Woolworth Co., which with dividends received in 1927 amounted to 1000 shares. In 1928 she received delivery from the trustees of 15,000 shares of Woolworth stock which represented shares owned by her father at his death, a subsequent tax-free stock split-up, stock dividends, and purchases by the trustees. In 1929 she surrendered the 16,000 shares she owned and received tax free 40,000 shares pursuant to a split-up of the stock. In 1933 she sold 10,000 of the shares received in 1929. There is no way of identifying the shares sold with any particular shares surrendered in 1929.

Dorothy K. G. Rogers became twenty-eight on August 26, 1924, and thirty-five on August 26, 1931, at which times she received distributions of the corpus. During 1933 she sold securities so received. Some of those securities had been purchased by the trustees, some by the executors, and others had been owned by her father at his death.

Seymour H. Knox attained the age of thirty on September 1, 1928, and received on that date one-half of the corpus, including 8,575 shares of stock of Maine Share Corp., of which 5,160 were purchased by the trustees on August 31, 1927, and 3,415 were purchased by the trustees on August 30, 1928. He later exchanged those shares in a non-taxable transaction and on June 10, 1930, sold the shares received in that exchange.

The Board of Tax Appeals[1] and the Circuit Court of Appeals (112 F. (2d) 530) held: (1) that the basis to respondents under § 113(a)(5) of the Revenue Acts of 1928 and 1932[2] as respects sales made by them was the fair market value at the time when the securities were delivered to them by the trustees, no matter when or how the trustees or the executors may have obtained the securities; (2) that in determining how long respondent Knox held securities for purposes of computing the term of his holding under § 101 of the Revenue Act of 1928, the date of transfer from the trustees should govern; and (3) that as respects the sale of Woolworth stock by respondent Campbell, her own shares should be treated, under the "first-in-first-out" rule, as sold prior to those which were delivered to her by the trustees.

It follows from our holding in *Maguire* v. *Commissioner, supra,* that the rulings on the first issue were erroneous. As respects the securities owned by the decedent at death, the basis is their value when delivered by the executors to the trustees. As respects the securities purchased by the trustees, the basis is cost to the trustees. And we are of the view that as respects securities purchased by the executors the basis is the value when delivered by them to the trustees. As we said in *Maguire* v. *Commissioner, supra,* the legislative history of § 113(a)(5) clearly indicates that it applies to purchases by executors. Hence it follows from our reasoning in *Maguire* v. *Commissioner, supra,* that the date of delivery by the trustees to the

[1] The opinion of the Board in Helvering v. Campbell is reported in 39 B. T. A. 916; its opinions in the other two cases are unreported.

[2] Sec. 113(a)(5) of the 1932 Act (47 Stat. 169, 199) was the same as § 113(a)(5) of the 1928 Act (45 Stat. 791, 819).

beneficiaries is no more appropriate here than it is in case of property owned by the decedent at date of death.

We also disagree with the court below on the second issue. Some of the securities were sold by respondent Knox more than two years after they had been purchased by the trustees.[3] For the reasons stated in *Helvering* v. *Gambrill, supra,* it follows, therefore, that they had been "held" by him for more than two years within the meaning of § 101(c)(8).

We also take a different view on the third proposition. The "first-in-first-out" rule is reflected in Treasury Regulations. The general rule[4] is that where shares of stock cannot be identified with any particular lots purchased, they will be charged against the earliest purchases.[5] For the purpose of determining the earliest purchases the regulation[6] adopts the rule of tacking contained in § 101(c)(8)(B). That being true, it must be presumed that the Woolworth stock coming from the decedent's estate was first sold. The holding by the trustees is included in that of the beneficiary. Hence, as we indicated in *Helvering* v. *Gambrill, supra,* the date of acquisition by the beneficiary was the date of death. It is that date of acquisition which governs the application of the "first-in-first-out" rule. Therefore, the court below was in error in ruling that respondent Campbell's own shares were sold first.

Respondents have contended, at least in regard to some of these issues, that the nature of their remainder interests necessitates a

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[3] On this phase of the cases no question is presented as to securities purchased by executors.

[4] Art. 58, Treas. Reg. 77, promulgated under the 1932 Act provides:

"Sale of stock and rights.—When shares of stock in a corporation are sold from lots purchased at different dates or at different prices and the identity of the lots cannot be determined, the stock sold shall be charged against the earliest purchases of such stock. In the determination of the earliest purchases of stock the rules prescribed in subparagraphs (A), (B), (C), and (D) of section 101(c)(8) (relating to the period for which property has been held) shall be applied. . . ."

And see Art. 600(4) dealing with stock or securities distributed in reorganization.

[5] The regulations refer only to "purchases". But no question has been raised as to their application to shares acquired under a will. In fact, the Board of Tax Appeals stated (39 B. T. A. 916, 919) that the "parties are in agreement that the first in, first out rule must be applied, since the shares which the petitioner sold can not be identified as those purchased at any particular time." Furthermore, respondent concedes here that the rule should not be limited to securities which have been bought as distinguished from those which have been otherwise obtained.

[6] Art. 58, *supra* note 4.

different result. Thus, in case of respondent Knox it is strongly urged that in view of the conditional nature of his remainder interest he held the securities only from the date when his interest became indefeasible and the securities were distributed to him, since one cannot be deemed to have held or acquired property which he might never obtain. But unlike the situation in *Helvering* v. *Hallock*, 309 U. S. 106, we are not concerned here with the question as to when the transfers took effect for purposes of the estate tax. As we indicated in *Maguire* v. *Commissioner, supra,* we are dealing only with a point of reference and a standard of value for determination of gains or losses realized on subsequent sales of property acquired by bequest, devise, or inheritance. For that purpose distinctions between vested and contingent remainders or between absolute and conditional property interests have no relevancy. Each remainderman has become the taxpayer because he has obtained possession and control of the property and has sold it. While the property is held in trust, the vested remainderman has no more rights of possession and control than the contingent remainderman. Yet each has acquired a property interest. The statutory provisions here in question come into play when that interest later ripens into full ownership and a sale is made. Hence the value of the property at the time when the taxpayer first acquires an interest in it has relevance to a subsequent determination of the gains or losses. As we remarked in *Maguire* v. *Commissioner, supra,* the residuary legatee in *Brewster* v. *Gage*, 280 U. S. 327, was held to have acquired his interest at date of death though at that time it was not absolute. To be sure, in these cases the interest of the remaindermen in the property at the earlier time was limited by the very terms of the bequest. But the tax here in question is not on their remainder interests; it is on gains realized by them as owners of that property. Hence, to carry into that computation the earlier value of the property is not to tax them on values which they never received. It merely provides a rule of thumb in alleviation of a tax which would be computed by reference to the entire amount of the original inheritance were it to be based on cost to the taxpayer.

Reversed.

The CHIEF JUSTICE and MR. JUSTICE ROBERTS think the judgments should be affirmed for the reasons stated by the court below, 112 F. (2d) 530.